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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 384

WALTER GERMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1967

No. _____

WALTER GERMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Walter Germann prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 12, 1967, in this proceeding.

Opinion Below

The opinion of the Court of Appeals, reprinted in the Appendix bound with this petition, is officially reported at 370 F. 2d 1019. The opinion of the District Court for the Southern District of New York officially reported at 262 F.

Supp. 707 and reprinted in the aforesaid Appendix, also appears at page 170 of the record on appeal.*

Jurisdiction

The judgment of the Court of Appeals was entered on January 12, 1967. A timely petition for rehearing and a hearing *en banc* was denied on February 17, 1967. The time for filing this petition was extended to July 17, 1967 by order of the Honorable John Marshall Harlan on May 16, 1967. Jurisdiction in this Court is invoked under 28 U. S. C. §§ 1254 (1), 2101 (c).

Questions Presented

1. Does a Federal District Court have the power to punish as contempt conduct not expressly within the terms of 18 U. S. C. §401 which provides that a court of the United States shall have power to punish for contempt conduct *"none other"* than specified in that statute?

2. Can a Federal court enlarge the categories of contempt cognizable under 18 U. S. C. §401 (3) by holding that a voluntary appearance of a witness before a grand jury subjects the witness to directions of the grand jury foreman with the same force and effect as if such directions had been the "writ, process, order, rule, decree, or command" of the court, so as to allow the punishment of the witness as a contemnor for disobedience of the grand jury foreman's direction?**

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* References to the record on appeal, a certified copy of which was filed with this petition, will be cited herein in the form, "App. a".

** Should certiorari be granted herein, petitioner reserves the right to brief and argue the following additional question:

> "Was the direction of the grand jury foreman to petitioner so clear and unambiguous under all of the circumstances as to allow punishment of petitioner as a contemnor for disobeying that direction?"

3. Is a defendant in a civil contempt proceeding denied due process where:

(a) Service of the order to show cause initiating the proceeding is made on him, a non-resident alien, by mailing a copy to him in a foreign country and by leaving a copy with an attorney who does not represent him in the proceeding; and

(b) He is not given an opportunity to be represented by counsel at the contempt hearing?

4. Are the guarantees of due process and the confrontation of witnesses denied when a judgment of contempt is upheld by the Court of Appeals,

(a) on evidence, consisting of the minutes of the two grand juries before which the alleged contemnor appeared, which was never before the District Court where the contempt proceeding was conducted and the penalty for the alleged contempt imposed;

(b) when the aforesaid evidence shows that the basic findings of the District Court were erroneous;

(c) when the evidence offered by the prosecution and relied upon by the District Court is shown in the Court of Appeals to have been incorrect within the knowledge of the prosecution?

5. Has a Federal District Court power or jurisdiction over a non-resident alien:

(a) to resort to substituted and extra-territorial service upon him of an order to show cause in a contempt proceeding;

(b) to enter a civil contempt judgment for the sole purpose of coercing him to come from his home

abroad to appear before a grand jury in this country; and

(c) to coerce him by the aforesaid judgment to testify and provide information the mere disclosure of which might subject him to a criminal prosecution in the nation of his citizenship and residence?

Statutory Provisions Involved

Title 18, United States Code, Section 401:

Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

• • •

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

Rule 42, Federal Rules of Criminal Procedure:

Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a)

of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Title 28, United States Code, Section 1783:

Subpoena of person in foreign country

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

(b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena. June 25, 1948, c. 646, 62 Stat. 949; Oct. 3, 1964, Pub. L. 88-619, § 10(a), 78 Stat. 997.

Title 28, United States Code, Section 1784:

Contempt

(a) The court of the United States which has issued a subpoena served in a foreign country may order the person who has failed to appear or who has failed to produce a document or other thing as directed therein to show cause before it at a designated time why he should not be punished for contempt.

(b) The court, in the order to show cause, may direct that any of the person's property within the United States be levied upon or seized, in the manner provided by law or court rules governing levy or seizure under execution, and held to satisfy any judgment that may be rendered against him pursuant to subsection (d) of this section if adequate security, in such amount as the court may direct in the order, be given for any damage that he might suffer

should he not be found in contempt. Security under this subsection may not be required of the United States.

(c) A copy of the order to show cause shall be served on the person in accordance with section 1783 (b) of this title.

(d) On the return day of the order to show cause or any later day to which the hearing may be continued, proof shall be taken. If the person is found in contempt, the court, notwithstanding any limitation upon its power generally to punish for contempt, may fine him not more than $100,000 and direct that the fine and costs of the proceedings be satisfied by a sale of the property levied upon or seized, conducted upon the notice required and in the manner provided for sales upon execution. June 25, 1948, c. 646, 62 State. 949; Oct. 3, 1964, Pub. L. 88-619, §11, 78 Stat. 998.

Statement of the Case

Petitioner, Walter Germann, at all times pertinent to this case was a citizen of Switzerland (App. 48a). In the Federal District Court for the Southern District of New York, he was, on August 15, 1966, tried in absentia, without counsel, and was found guilty of civil contempt of that Court (App. 45a, 54a-55a). A fine was imposed of $25,000.00 payable August 22, 1966, and a further cumulative fine was imposed of $1,000.00 per day for each day after August 22, 1966 that petitioner did not appear before a grand jury in the Southern District of New York (App. 46a). Petitioner was held in contempt for his disobedience of the May 10, 1966 oral instruction by the foreman of the May regular grand jury to return before the grand jury on May 31, 1966 (262 F. Supp. at 708). There was

no outstanding writ, process, order, rule, decree or command of the District Court which called for petitioner's appearance on May 31, 1966.

In the afternoon of April 28, 1966, while on a brief temporary visit to New York City, petitioner was served with a grand jury subpoena calling for his appearance the following morning at ten o'clock before the grand jury sitting in Room 1401 of the United States District Court for the Southern District of New York (App. 9a). Without counsel, petitioner appeared at the time and place specified in the subpoena which brought him before the April special grand jury where he testified (App. 6a, 108a; 262 F. Supp. at 708). No further subpoena was issued nor was any order or direction made by the Court requiring petitioner's appearance before a grand jury between April 29 and May 31, 1966 (App. 52a).

On May 2 and again on May 6, 1966, petitioner reappeared before the April special grand jury and testified. On the latter date, petitioner was requested by the foreman to return before *that* grand jury on May 10, 1966.* However, on May 10, 1966 petitioner was taken by the prosecuting attorney not before that body but before the May regular grand jury which caused him to be resworn, heard his testimony, and requested him to return before it on May 31, 1966.*

The only attorney consulted by petitioner during this period, Richard H. Wels, Esq., did not represent petitioner or appear with him in connection with any of petition-

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* According to the minutes of the grand jury proceedings which were first produced before the Court of Appeals. As discussed *infra*, the failure of the prosecuting attorney to produce these minutes before the District Court led it to make erroneous findings of fact on which its contempt judgment was based.

er's grand jury appearances (App. 108a-09a). On the afternoon of May 6, 1966, that attorney did intercede with the Assistant United States Attorneys in charge of the grand jury investigation because petitioner was being prevented from returning to Switzerland to attend to pressing business affairs (App. 109a). That same afternoon those Assistant United States Attorneys, allegedly pursuant to the grand jury investigation, interrogated petitioner at length privately in their office, out of the presence of the grand jury, from which interrogation Mr. Wels was excluded (App. 110a). In the evening of the same day, the aforesaid Assistant United States Attorneys stated that after a further grand jury appearance on May 10, 1966, petitioner would be permitted to return to Switzerland (App. 110a).

On May 31, 1966, petitioner caused to be forwarded from Switzerland to the United States Attorney's office a telex message stating that he could not appear on that date because he had been advised by Swiss counsel that if he provided the information desired by the Assistants, he would be violating Swiss statutes governing banking secrecy and economic espionage, 262 F. Supp. at 708, which carry criminal penalties.

In July of 1966, an order to show cause was issued by the United States District Court for the Southern District of New York directing petitioner to show cause why he should not be held in contempt of court for his non-appearance on May 31, 1966 (App. 4a). The order to show cause did not specify whether the contempt proceedings were civil or criminal in nature. It was "served" on petitioner by leaving a copy at the office of Mr. Wels, who did not represent him herein except as just stated, and by mailing a copy to petitioner in Basel, Switzerland (App. 28a-29a). To represent him in the contempt proceedings,

petitioner retained the New York law firm of Donovan, Leisure, Newton & Irvine, which firm, however, withdrew from the case on or about August 5, 1966, a few days before the hearing. 262 F. Supp. at 708. (App. 172a). When informed of the withdrawal, petitioner immediately took steps to secure other representation (App. 54a-55a). At the hearing on Monday, August 15, 1966, an attorney informed the court that his firm, Baker, McKenzie & Hightower, had been contacted the previous Friday concerning their ability to represent petitioner, and asked the District Court for a brief adjournment for the firm to familiarize themselves with the case (App. 14a). The court, however, denied the adjournment (262 F. Supp. at 708; App. 172a) after the prosecution requested and was granted an adjournment of "the criminal aspect of the motion" (App. 13a). The court heard brief testimony, offered by the prosecution, of the agent who served the subpoena (App. 31a-32a), the grand jury reporter (App. 32a-34a), the foreman of the *May regular grand jury* (App. 34a-35a), and one of the prosecuting attorneys (App. 35a-40a). On the same day the District Court entered an order and judgment of contempt against petitioner (App. 45a-46a), at the urging of the prosecutor that "We are not trying to punish Mr. Germann for anything. We are really trying to invoke the process of this Court to compel his appearance", *i.e.*, to compel him to come from Switzerland to testify before the prosecutor or a grand jury in New York (App. 21a). The contempt judgment, although stating by its terms that it is civil in nature, contains no purge clause.

A subsequent motion by present counsel to vacate the judgment and proceedings was denied on September 27, 1966. 262 F. Supp. 707.

In denying the motion to set aside the contempt judgment, the District Court made the following findings and rulings:

1. The Court's original judgment of contempt on August 15, 1966 was based upon petitioner's failure to appear on May 31st "in response to a lawful direction" of the foreman of the May regular grand jury (App. 173a). 262 F. Supp. at 709.

2. The contempt judgment was sustained on the motion to vacate it, however, on the ground that the form subpoena served on petitioner on April 28, 1966 which brought him before the April special grand jury contained the printed language that petitioner was "not to depart the Court without leave thereof, or of the United States Attorney" (App. 176a), 262 F. Supp. at 710, and that the United States Attorneys' permitting petitioner to return home to Switzerland did not excuse petitioner's further attendance because "such an interpretation would be at odds with the express direction" of the foreman of the May regular grand grand jury commanding petitioner's reappearance (App. 177a). 262 F. Supp, at 710.

3. The District Court found that after petitioner had complied with the April 28th subpoena by appearing on April 29th before the April special grand jury, the foreman of that grand jury had directed petitioner "to reappear before the May grand jury on May 2, 1966", and that petitioner's appearances on May 6th and May 10th were "each time pursuant to the oral direction of the foreman of the May Grand Jury" (App. 171a). 262 F. Supp. at 708.

4. The District Court's jurisdiction over petitioner in the contempt proceeding did not require "additional personal service of process" but was merely ancillary to the original subpoena of April 28, 1966 and therefore service of the order to show cause was properly made by mail to petitioner in Switzerland and by leaving a copy with the attorney, Mr. Wels, who admittedly did not appear in con-

nection with the grand jury proceedings (App. 174a). 262 F. Supp. at 709.

5. The opinion denying the motion to vacate, written by the same Judge who conducted the "hearing" of August 15, 1966, states "The record before us is barren of any evidence indicating a denial of counsel or that there was inadequate time to obtain counsel if desired" (App. 175a). 262 F. Supp. at 709.

6. The court did not distinguish between the authority of a grand jury foreman to give directions to a witness and the power of the District Court to punish as a contempt an alleged disobedience of such a direction under 18 U. S. C. §401(3).

7. That petitioner's appearance before the grand jury with the information requested by the prosecutor would cause him to violate Swiss penal statutes was rejected by the District Court as "speculative and unavailing as a defense to a contempt proceeding predicated on his failure to appear" (App. 177a-78a), 262 F. Supp. at 711, although that objection was raised on behalf of petitioner to the court's order of August 15, 1966 which was designed to coerce such an appearance.

In affirming the judgment of contempt, the Court of Appeals for the Second Circuit adopted the following procedure and made the following determinations:

1. Agreeing with petitioner's counsel that the record before the District Court was barren of any evidence to show by what means and under what, if any, compulsion petitioner, who started as a witness before the April special grand jury, was brought before the May regular grand jury, the Court called upon the prosecutor for production of extracts of the grand jury minutes for each of petitioner's appearances. When produced after argument of the

appeal, those minutes showed that petitioner's appearance of April 29, 1966, pursuant to the subpoena, and the appearances of May 2 and May 6, 1966 were before the April special grand jury, the foreman of which on the last day requested petitioner to reappear before the April special grand jury on May 10, 1966. The minutes of petitioner's May 10, 1966 appearance show that on that date he was taken for the first time before the May regular grand jury and requested by the foreman of that grand jury to reappear before it on May 31, 1966. This evidence had not been before the District Court which held the "hearing" and imposed the judgment of contempt.

2. On the evidence of the grand jury minutes, the Court of Appeals did not, as it could not, sustain the District Court's finding that petitioner's appearance before the May regular grand jury on May 10, 1966 and the request of its foreman on that date that petitioner return on May 31, 1966 were based on the authority of the subpoena which had previously brought petitioner before the April special grand jury. Instead, the Court of Appeals held that a witness who appears before a grand jury as a mere volunteer subjects himself to oral directions of the foreman to reappear which directions have the same force and effect as if they were the "process", "order" or "command" of the court itself. The Court of Appeals stated:

> "It is implicit in the operation of the grand jury as an arm of the district court under Rule 6, Federal Rules of Criminal Procedure, see, e.g. Levine v. United States, 362 U. S. 610, 617, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960) that the attendance of witnesses before a grand jury may be directed by the foreman or deputy foreman of that grand jury. Once the witness has appeared before the grand jury, *whether pursuant to subpoena or of his own volition.*

> *the witness is subject to the orders of the grand jury.* The grand jury acts through its foreman or deputy foreman; they have the power to direct the witness to return at a stated time just as they have the power to administer an oath. It is true that the power to administer an oath or an affirmation is explicitly provided in the Federal Rules of Criminal Procedure, Rule 6(c), whereas there is no provision which specifically confers any power that the grand jury may direct further appearance of the witness." 370 F. 2d at 1021; emphasis added.

3. Although noting that there was no precedent for its decision, the Court of Appeals was of the opinion that the exercise of the District Court's contempt power herein could be sustained because "it had been the practice for many years prior to the enactment of the federal rules for grand juries in the Southern District and in other districts to give such directions and to record them in their minutes." 370 F. 2d at 1022.

4. While the Court of Appeals agreed that the District Court had no power to order the appearance of a non-resident alien, it held that, inasmuch as petitioner had once been subpoenaed, "jurisdiction thus attaches [and] the court, acting through the grand jury, has the power to direct further appearances during its investigation and until the witness has been excused." 370 F. 2d at 1023. It was thought to make no difference that in fact there had been no direction by the court, that the grand jury which requested petitioner's reappearance was not the grand jury before which he had been taken pursuant to subpoena, and that the original and only subpoena was no longer in effect.

5. The Court of Appeals stated that petitioner's "other contentions do not merit discussion". 370 F. 2d at 1023.

Reasons for Granting the Writ

1. The holding below that an oral direction of a grand jury foreman is for contempt purposes the same as the command of the court itself, is forbidden by statute, and is contrary to the decisions of this Court and other courts.

The Second Circuit held below that:

> "a witness before a grand jury is in disobedience of the command of the district court in violation of 18 U.S.C., §401, when he fails to return for further questioning at a time expressly directed by the foreman of that grand jury and recorded in the grand jury's minutes." 370 F. 2d at 1020.

Section 401 provides, however, so far as here relevant, that:

> "A court of the United States shall have power to punish * * * such contempt of its authority, *and none other,* as—
>
> * * *
>
> (3) Disobedience or resistance to *its* lawful writ, process, order, rule, decree, or command." (Emphasis added)

This Court has held that the Act of 1831, 4 Stat. 487, which is now Section 401 of Title 18, U.S.C., completely encompasses the powers of the Federal courts to punish for contempt and was enacted by Congress to eliminate persistent abuses of the contempt power by courts unfettered in its application. *Green* v. *United States,* 356 U. S. 165, 171-72, 78 S. Ct. 632, 636-37 (1958); see also *In re Michael,* 326 U. S. 224, 66 S. Ct. 78 (1945); *Nye* v. *United States,* 313 U. S. 33, 45-53, 61 S. Ct. 810, 814-17 (1941); See also *Raymor Ballroom Co.* v. *Buck,* 110 F. 2d 207, 210 (1st Cir. 1940); *Klein* v. *United States,* 151 F. 2d 286, 287 (D. C. Cir. 1945).

This case represents a sharp departure from the statutory and judicial restrictions on the exercise of contempt power by a Federal court. On its face Section 401 does not make a contempt the disobedience by a witness of an oral direction of a grand jury foreman. The Second Circuit found this no impediment beacuse it held that the oral direction of a grand jury foreman *is* "'process' within the meaning of 18, U. S. C. §401(3) or an order or command of the court." 370 F. 2d at 1021. The rationale offered for this novel holding was that "it is implicit in the operation of the grand jury as an arm of the district court under Rule 6, Federal Rules of Criminal Procedure." Ibid.

The Court of Appeals analogized the power of a grand jury foreman to administer an oath which is granted by Rule 6 to the presumed power of the grand jury foreman to orally direct a witness to reappear at a subsequent date, which is not granted by Rule 6, nor indeed, is there any rule or statute setting forth such power. The ground offered for this analogy was:

> "it would be an absurd interpretation of the rules and the power of a district court to hold that a grand jury acting through its foreman could not direct the further attendance of the witness when the witness is present before it." 370 F. 2d at 1022.

Again, it may be seen that even in the analogy the Court of Appeals equated the power of the grand jury with that of the District Court. The Court of Appeals also relied upon the inherent power of the grand jury (court) or at least the power of custom. It held:

> "While there is no reported opinion affirming this power of the grand jury, we think it more in point that it had been the practice for many years *prior*

> *to the enactment of the Federal Rules* for grand juries in the Southern District and in other districts to give such directions . . .'"* Ibid. (emphasis added)

This Court held in *Green* v. *United States, supra*:

> "we find no case suggesting that subdivision (3) of §401, before us here, is open to any but its obvious meaning. This clause also finds its statutory source in the Act of 1831, which first made explicit the authority of federal courts to punish for conduct of the kind involved in this case by providing that the contempt power should extend to '* * * disobedience or resistance * * * to any lawful writ, process, order, rule, decree, or command * * *.' *of a federal court.*" 356 U.S. at 172, 78 S. Ct. at 637; emphasis supplied.

This Court held also that a confusion of function between the court and the grand jury was fatal to a contempt judgment. *In re Oliver,* 333 U. S. 257, 264-65, 68 S. Ct. 499, 503 (1948).

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* The prosecution contended that it was their invariable custom to have subpoenas requiring an appearance before a grand jury adjourned by the foreman of the grand jury concerned, and that this practice was followed in this case (App. 65a). Evidence was produced on behalf of petitioner, however, in support of the motion to vacate the judgment below, which showed that the United States Attorney's office for the Southern District of New York did in fact issue successive subpoenas when a grand jury appearance was "adjourned" (App. 151a-55a). The grand jury minutes produced before the Court of Appeals show that in this case no attempt was made by the prosecution to have the grand jury foreman "adjourn" the subpoena which was satisfied by petitioner's appearance on April 29, 1966, and further show that the grand jury foreman in fact did not "adjourn" that subpoena. See Appendix G, p. 21a, *infra.*

This Court's decision in *Brown* v. *United States*, 359 U. S. 41, 79 S. Ct. 539 (1959), indicates that a witness is not in contempt of the court if he disobeys the direction of a grand jury foreman:

> "When the petitioner first refused to answer the grand jury's questions, he was guilty of no contempt. He was entitled to persist in his refusal until the court ordered him to answer." 359 U. S. at 49-50, 79 S. Ct. at 546.

The *Brown* opinion also seems to leave little doubt that the functions of the court and grand jury while related are separate—the grand jury investigates, the court itself and only the court compels by commands, process, and orders:

> "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so." 359 U. S. at 49, 79 S. Ct. at 546.

See also *United States* v. *Cox*, 342 F. 2d 167, 171 (5th Cir. 1965), cert. den., 381 U. S. 935, 85 S. Ct. 1767.

This Court found it useful in *United States* v. *Barnett*, 376 U. S. 681, 695-96, 699, 701-724, 84 S. Ct. 984, 992, 995-1007 (1964), a Federal contempt case, to survey the law of contempt in New York and the other States. The New York, as the Federal, law of contempt is statutory. Section 750(3) of the Judiciary Law of the State of New York as interpreted by the highest New York Court in *Spector* v. *Allen*, 281 N. Y. 251 (1939), is nearly identical with 18 U. S. C.

§401(3), and is given the strict interpretation which this Court has held the Federal statute should receive. In *Spector* v. *Allen, supra,* the Court of Appeals held:

> "The Grand Jury is an arm of the Court *but it is not the court.* Its foreman has no authority to issue a 'mandate' of the court within the meaning of Section 750 of the Judiciary Law." 281 N. Y. at 260; emphasis supplied.

Spector, as have numerous other New York decisions, held that disobedience of a grand jury foremans oral order was not punishable as a contempt. See, *e.g., Mullen* v. *Halleran,* 177 Misc. 734, 738-39 (Queens Co. Ct. 1941); *Nelson* v. *Hand,* 23 Misc. 2d 1077, 204 N. Y. S. 2d 424, 426 (Onondaga Co. 1960); *In re Kaplan,* 8 N. Y. 2d 214, 203 N. Y. S. 2d 835 (1960). The New York decisions are squarely contrary to the holding of the Court below. Although called to the Second Circuit's attention, they were not even referred to in the opinion below.

It is also evident that the thrust of this Court's decision in *Gojack* v. *United States,* 384 U. S. 702, 714, 86 S. Ct. 1689, 1696 (1966) was overlooked by both Courts below in their holding that because, insofar as the record indicates, the two grand juries before which petitioner appeared were conducting an authorized investigation and there was nothing *per se* unlawful about the foreman's request that petitioner return on May 31, 1966, petitioner must be held in contempt for his failure to respond to that request. Petitioner made no attack below on the authority of the two grand juries to investigate nor upon their conduct of their investigations. The grand juries here, like the Congressional subcommittee in *Gojack,* were free to pursue their investigation in the manner they saw fit, including, as here, the making of informal requests to witnesses to appear

before them. However, in *Gojack,* as here, it is entirely another matter when the Congressional subcommittee or the grand jury seeks to impose contempt penalties upon witnesses for failure to honor their requests. As this Court held in *Gojack,* the imposition of a contempt penalty is dependent upon a full compliance with the statutory procedures governing the contempt. The focus below should not have been on whether the grand jury's mode of investigation was a proper one but whether petitioner's conduct fell within the instances to which the court's contempt power is limited in 18 U. S. C. §401.

The consequences of the holding below that the oral direction of a grand jury foreman to a witness is the process or order or command of the court within the meaning of 18 U. S. C. §401(3) are ominous. It renders unnecessary or perfunctory the hearing in a contempt proceeding which this Court held was so vital in *Harris* v. *United States,* 382 U. S. 162, 165-67, 86 S. Ct. 352, 354-55 (1965). The District Court's only role would be to determine if in fact a grand jury foreman had made a direction and the witness had failed to comply. Once it made such a finding, contempt would follow automatically. This would for all practical purposes leave the determination of the contempt in the hands of the grand jury, a function proviously denied that body by this Court. *In re Oliver,* 333 U. S. at 264-65, 68 S. Ct. at 503.

If, as the Court of Appeals below held, the direction of a grand jury foreman is the command of the court, then a witness who disobeys it has committed a contempt in the presence of a "court" and may be proceeded against summarily under Rule 42(a) of the Federal Rules of Criminal Procedure. This result plainly offends the procedure established by this Court for contempt cases in *Harris* v. *United States, supra.* The ruling in *Harris* was that an alleged

contempt involving conduct before a grand jury required the procedure of Rule 42(b). *Brown* v. *United States* was overruled by *Harris* to the extent that it approved summary procedure under Rule 42(a) even where the grand jury witness repeated his alleged misconduct in the actual presence of the district judge.

What the Court of Appeals has done in this case is to base a court's exercise of contempt power on metaphor rather than on statute as has happened in some State courts. See *e.g.*, *State* v. *Goff*, 228 S. C. 17, 88 S. E. 2d 788 (1955)*. This is a return to judicial definition of contempts which is contrary to the express purpose of the Act of 1831, now 18 U. S. C. §401.

When a grand jury witness is served with a subpoena requiring his attendance at a future date, he may move to quash it in the District Court through well-established procedures. If the oral direction of a grand jury foreman is substituted for the usual subpoena, as allowed by the court below, there is no procedure by which a witness may move to have the propriety of that direction examined by the court. See *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (7th Cir. 1956). Indeed, the holding below would preclude such an examination even if there were procedure for it. The decision herein effectively appoints grand jury foremen to an office coordinate with that of the District Judge. It is a well known rule of "comity" that District Judges do not undertake to review the propriety of each other's orders.

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* A contempt is committed in the presence of the Court, *Goff* holds, if "When the Court is in session, in order to extend its protection to its officers, jurors and witnesses, it must be considered to be present where those persons are required to be in the performance of their several duties." 228 S. C. at 23, 88 S. E. 2d at 791.

Even were the question open, there would be sound reasons for ruling that the foreman of grand jury does not hold an office co-ordinate with that of a district judge, free to enter binding orders, disobedience of which may be punished as a contempt. Experience has shown that grand juries have abused their powers. Indeed the government itself recently was caused some discomfiture when the United States Attorney for the Southern District of Mississippi was held in civil contempt for refusing to obey the direction of a grand jury foreman to sign and file unauthorized indictments which the grand jury had voted. *United States* v. *Cox*, 342 F. 2d 167 (5th Cir. 1965), cert. den. 381 U. S. 935, 85 S. Ct. 1767 (1965). See also *Application of United Electrical Radio & M. Workers*, 111 F. Supp. 858, 865-70 (S. D. N. Y. 1953) and cases there cited, where the grand jury issued a presentment accusing 13 union officials, who were not indicted, of misconduct and instructing the NLRB to take action which the courts later had to stay, and had conducted a searching inquiry into the religious beliefs of witnesses before it, coercing answers with the threat of contempt proceedings.

Last term this Court reversed several civil contempt cases where the penalty imposed extended beyond the life of the grand jury before which the contempt had occurred. *Shillitani* v. *United States*, 384 U. S. 364, 86 S. Ct. 1531 (1966); *Pappadio* v. *United States, Ibid; Castaldi* v. *United States*, 384 U. S. 886, 86 S. Ct. 1906 (1966); *Tramunti* v. *United States, Ibid.* The procedure sanctioned below eliminates this safeguard and provides for unlimited harassment and detention of witnesses. Petitioner first appeared before the April special grand jury. Two weeks later he was taken by the prosecutor before the May regular grand jury, and at the conclusion of his testimony there he was orally directed by the foreman to return three weeks later for his fifth grand jury appearance. In metropolitan areas of

which there are many in the United States, there are usually several grand juries, all with different terms, sitting simultaneously. If it is permissible for the prosecutor, without process, to place a witness before any and all grand juries and rely upon oral directions of their foreman to compel continual reappearance of a witness before any other grand jury, the prosecutor may indefinitely prolong the enforced attendance of a witness. As a corollary of this procedure, the civil contempt penalty for disobeying such oral directions is, accordingly, without limitation, whether it be imprisonment or the extravagent cumulative daily fine imposed below, for "the grand jury" is perpetually in session.

2. Due process requires that a court seeking to punish for contempt have personal jurisdiction over the alleged contemnor and, if it has such jurisdiction, that it afford him the right to be represented by counsel.

(a) The District Court lacked jurisdiction over petitioner.

The order to show cause which initiated the contempt proceeding against petitioner in July of 1966 provided, "Service of this order on the respondent, Walter Germann, or on his counsel, Richard Wels, . . . shall be deemed sufficient" (App. 5a). "Service" was made by leaving a copy of the order at the offices of the law firm of which Mr. Wels was a member (App. 28a, 112a), and by mailing a copy to petitioner in Basel, Switzerland (App. 29a). The Court of Appeals did not discuss the propriety of obtaining jurisdiction over petitioner in the contempt proceeding in this matter. The District Court held that it had jurisdiction over petitioner in the contempt proceeding pursuant to the

original subpoena served on petitioner on April 28, 1966.* 262 F. Supp. at 709. The District Court then misread *Harris* v. *United States*, 382 U. S. 162, 165, 86 S. Ct. 352, 354 (1965) as holding that "The order to show cause was not a new order, requiring additional personal service of process", 282 F. Supp. at 709, because the contempt proceeding was merely ancillary to the grand jury hearing.

The passage in *Harris* relied upon by the District Court did not relate to the contempt proceeding but to the procedure whereby a grand jury witness is brought before the District Court and directed to answer certain questions which he had previously refused to answer before the grand jury, 382 U. S. at 165, 86 S. Ct. at 354. This Court held *that* type of "appearance before the District Court was not a new and different proceeding, unrelated to the other. It was ancillary to the grand jury hearing and designed as an aid to it." *(Ibid.)*. This Court then held that a grand jury witness who continued his refusal to answer before the Court did *not* commit a contempt in the presence of the court within the meaning of Rule 42(a) of the Federal Rules of Criminal Procedure. In such circumstances the District Court may not proceed summarily but must comply with all the procedural safeguards set forth in Rule 42(b).

Rule 42(b) is quite explicit as to how a contempt proceeding must be initiated. When there is no notice given directly by the court to the defendant before it, as there

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* The Court stated:

> "When the subpoena of April 28, 1966 was personally served upon him, the jurisdiction of this Court was established." 262 F. Supp. at 709.

The District Court was under the misapprehension that all of petitioner's grand jury appearances were pursuant to this subpoena. How it was led into this error is discussed under heading "3", *infra*.

was not in this case, then the proceeding must be initiated "by an order to show cause or an order of arrest." F. R. Crim. P., Rule 42(b). It is the plain sense of Rule 42(b) that service of the initiating process must be made personally on the defendant. An oral direction by the court to the defendant before it accomplishes this. So does an order of arrest when properly executed. An order to show cause may not, merely by the device of including a provision for substituted service, do away with this requirement. Service must be personal and made within the territorial jurisdiction of the court. *Carpenter* v. *Kane,* 251 F. 2d 20 (D. C. Cir. 1957); *Baskin* v. *Montedonico,* 26 F. Supp. 894 (W. D. Tenn.), affd. 115 F. 2d 836 (6th Cir. 1940); *cf. Lasch* v. *Antkies,* 161 F. Supp. 851 (E. D. Pa. 1958); *Ash* v. *Holdeman,* 15 Misc. 2d 844, 182 N. Y. S. 2d 34, 35 (S. Ct. Sp. Term, Kings Co. 1958); see also *In re Samuel Kwelman,* not officially reported, noted 26 A. B. A. J. 179, 12/20/39.

The District Court held below that service on the attorney was proper here under Rule 5 of the Federal Rules of Civil Procedure. Rule 5, however, provides a mode for service of papers subsequent to initiation of a cause after jurisdiction has already been obtained over the parties, not a method in contravention of Rule 42(b), F. R. Crim. P., of gaining original personal jurisdiction. The Court's error in this regard is illustrated by the only case it cited, *Tilghman* v. *Tilghman,* 57 F. Supp. 417 (D. D. C. 1944),* which was an application of the principle announced by this Court in *Leman* v. *Krentler-Arnold, Hinge Last Co.,* 284 U. S. 48, 52 S. Ct. 238 (1932).

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* Actually, in *Tilghman* personal service had been effected on the alleged contemnor who raised the unsuccessful argument that under Rule 5(b) service should have been made on his attorney and not on him.

The misuse of Rule 5 to establish jurisdiction over petitioner below is also shown by *Ash* v. *Holdeman, supra,* and *Monteiro* v. *Sociedad Mar. San Nicolas, S.A., etc.,* 155 F. Supp. 382, 383 (S. D. N. Y. 1957).*

In the present case, petitioner was a party to no action in the District Court, had not submitted himself to its jurisdiction, and the attorney upon whom service was made admittedly neither represented petitioner in the contempt proceeding nor appeared with petitioner at any of the grand jury proceedings. 262 F. Supp. at 709 n. 2.

The attempt to serve petitioner by mail in Switzerland offends the provision of Rule 4(f) of the Federal Rules of Criminal Procedure effective July 1, 1966 that:

> "an order of commitment for civil contempt may be served * * * within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state * * * [and] at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced."

This limitation was brought to the attention of the District Court (App. 126a-27a), but was ignored by it and by the Court of Appeals. The only statute allowing extra-territorial service of an order to show cause in a contempt case

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* "An attorney authorized to appear in an action has an authority limited to that action. He is not a general agent for his client. Similarly, an authorization for counsel to accept service of process for a party in a particular action . . . does not constitute said counsel as agent for the party for all purposes, . . ." 155 F. Supp. at 383.

requires personal service. 28 U. S. C. §§ 1784(c), 1783(b); F. R. Civ. P. Rule 45(e).*

No statute or rule authorized personal jurisdiction over petitioner in the contempt proceedings below. By the device used for creating jurisdiction in the District Court herein, jurisdiction could be obtained over any and all of the thousands of alien non-residents who had at some prior time passed through this country. All such persons "voluntarily" appeared before some Governmental agency, e.g., Customs and/or Immigration, which have the power to issue personal process. Indeed, under the District Court's holding, their presence here at any time would not be necessary for the exertion of jurisdiction over them. The District Court held that it was sufficient for its jurisdiction if actual notice of the contempt proceeding was given. 262 F. Supp. at 709. There are few, if any, inhabitants of the world to whom "actual notice" might not be given. Notice of a proceeding in a Federal court is an important aspect of due process but it does not of itself create jurisdiction over the person to whom notice is given.

The District Court confused its subject matter jurisdiction with *in personam* jurisdiction. It held that because the April 28th subpoena served on petitioner was a printed form containing the language, "'* * * and not to depart the Court without leave thereof, or of the United States Attorney' ", 262 F. Supp. at 710, it had continuing jurisdiction over petitioner insofar as the respective grand jury foremen acted under that language to direct petitioner's further appearances before the two successive grand juries (Ibid.). The court then circuitously reasoned that since,

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* As discussed under heading "4" herein, service under Sections 1783, 1784 of Title 28 is available only if the person to be served is a national or resident of the United States.

it held, petitioner was in contempt for his alleged failure to obey the second grand jury foreman's direction to appear on May 31st, there was continuing jurisdiction in the District Court for the purpose of the contempt proceeding. An impenetrable thicket of difficulties lies across such a course. The quoted language in the subpoena form is not authorized by statute or rule and has no legal effect. The District Court's reliance upon a minor point in *Blackmer* v. *United States*, 284 U. S. 421, 443, 52 S. Ct. 252, 257 (1932) is misplaced. 262 F. Supp. at 710. Such a command in a subpoena was at the time of *Blackmer* expressly sanctioned by statute, former 28 U. S. C. §655, which was repealed in 1948 during the general revision of the Judicial Code and the Federal Rules. 62 Stat. 992, 993.* Even if that language

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* 28 U. S. C. §655 was repealed by the Act of June 25, 1948, c. 646, §39, 62 Stat. 992. §39 provided: "The sections or parts thereof of the Revised Statutes of the District of Columbia, Revised Statutes of the United States, or statutes at large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal." There then followed at 62 Stat. at p. 993 amongst the "Schedule of Laws repealed", "Revised Statutes §877—U. S. Code Title 28, §655."

28 U. S. C. §655 was derived from R.S. §877 which was in turn derived from the Act of Feb. 26, 1853, c. 80, §3, 10 Stat. 169. The amendment in 1911, c. 231, §291, 36 Stat. 1167 conferred certain powers of the Circuit Court upon the District Courts. The only reference to 28 U. S. C. §655 discovered in the proceedings preliminary to the adoption of the new Federal Rules is contained in the proceedings at Cleveland in 1938 (Federal Rules of Civil Procedure and proceedings of the A. B. A. Institute) where in Table II, Appendices, it is provided: "This table shows the Constitution, its amendments, and the section of the U. S. Code to which references are made in the Federal Rules of Civil Procedure and the notes thereto" (at p. 418). Thereafter; on page 420, a line reads, "Title 28 U. S. C. §655 —Rule 45 Federal Rules of Civil Procedure."

(*Footnote continued on following page*)

in the subpoena form was authorized, petitioner had been excused to go to Switzerland by the United States Attorney (App. 110a; cf. 262 F. Supp. at 710). As the minutes of the grand jury revealed when finally produced before the Court of Appeals, petitioner's last grand jury appearance on May 10, 1966 was so obviously not pursuant to the subpoena that the Court of Appeals in its opinion treated that appearance as voluntary. 370 F. 2d at 1020, 1021, 1022.

(*Footnote continued from preceding page*)

The Preliminary Draft of the Federal Rules of Criminal Procedure, May 1943, Vol. 2, as to Rule 20—subpoena (now Rule 17(a)) simply provided: "The rule is based on Federal Rules of Civil Procedure, Rule 45 (subpoena). The Second Preliminary Draft, February 1944, now Rule 19(a), in the June 1944 Report and in the March 1945 Report which refers to the rule as 17(a) is the same. However, in the forms adopted as the official forms, originally Forms 15 for testimonial subpoenas and 16 for *duces tecum*, the provision "not to depart the Court without leave thereof, or of the United States Attorney" was eliminated. The same was true with respect to the forms later numbered 20 and 21 on the June 1944 Report of the Committee. The same numbered forms exist in the Appendix of Forms at the end of the Rules of Criminal Procedure, pages 526-527, "As amended December 27, 1948, effective October 20, 1949". On January 3, 1949, the Attorney General of the United States in a letter to Congress recommended only one change in Forms 20 and 21 dealing with subpoenas and that was to change the heading from "District Court" to "United States District Court". In Barron & Holzoff, referring to the forms of subpoena adopted by the Federal Rules of Criminal Procedure, there is set out the forms of grand jury subpoena which the authors say they obtained from the Department of Justice (§4598, p. 730) which is exactly like Form 20 (§4595) except that it specifies an appearance before the grand jury. However, the authors say the only proper form is Form 20 (§4595). Nothing is suggested anywhere upon the repeal of 28 U. S. C. §655 that the subpoena issued to appellant with the archaic words "not to depart without leave of Court or the United States Attorney" is properly useable and good law. Indeed, the official forms are to the contrary.

(b) A defendant in a contempt proceeding is entitled to be represented by counsel.

This Court has consistently held that a defendant in a contempt proceeding is entitled to a full hearing on the charges, which can only be obtained if the defendant is allowed the opportunity to be represented by counsel. *Harris* v. *United States,* 382 U. S. 162, 166 n. 4, 86 S. Ct. 352, 355 n. 4 (1965); *In re Green's Petition,* 369 U. S. 689, 691-92, 82 S. Ct. 1114, 1116 (1962); *In re Oliver,* 333 U. S. 257, 275-76, 68 St. Ct. 499, 508-09 (1948); *Cooke* v. *United States,* 267 U. S. 517, 537, 45 S. Ct. 390, 395 (1925). *Cooke* v. *United States, supra,* which has been consistently followed by this Court, roots the right to counsel at a contempt proceeding in the Constitutional guarantee of due process as well as the guarantee of the Sixth Amendment:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." 267 U. S. at 537, 45 S. Ct. at 395.

These guarantees were not effectuated by the courts below. At the "hearing" of Monday, August 15, 1966 on the order to show cause, an attorney asked the District Court for a brief adjournment of the proceedings as his office had just been contacted on the preceding Friday, August 12, 1966, as to whether they would be able to represent petitioner therein, and needed the time to determine whether

they could represent petitioner and to prepare for the hearing (App. 14a-16a). This request was denied by the court (App. 172a) 262 F. Supp. at 708. The District Court thereupon proceeded to hold a summary proceeding which resulted the same day in the order and judgment of contempt without any opportunity having been afforded petitioner to be represented by counsel, although the court was expressly requested to grant such opportunity. Thus, there was only a single fleeting opportunity for counsel to be requested on petitioner's behalf and that request was preemptorially refused.

The prosecutor argued below that the formalities as to representation by counsel had been observed or perhaps waived because prior to the "hearing" of August 15th petitioner had retained a distinguished New York law firm to represent him, even though that law firm had withdrawn its representation, had informed the prosecutor that it could not represent petitioner barely a week prior to the hearing, and had taken no steps before the court to represent him either through actually appearing on his behalf or by filing a response to the order to show cause, or in any other way. Although these facts were presented to the trial court, it ruled that:

> "The record before us is barren of any evidence indicating a denial of counsel or that there was an inadequate time to obtain counsel, if desired." (App. 175a). 262 F. Supp. at 709.

The Court of Appeals passed the question with the following cryptic observation:

> "Following a hearing which neither Germann nor his counsel attended, although they had been duly advised thereof, Judge Cooper held Germann in civil contempt for his failure to appear before the grand jury on May 31, 1966." 370 F. 2d at 1021

What counsel the court below referred to as "his counsel" is difficult to ascertain. The record is clear, however, that petitioner, through no fault of his own, was not represented by counsel before the court in the contempt proceeding and the "hearing" was held without granting him the opportunity to be so represented.

3. A contempt conviction may not be sustained by evidence which was never before the District Court, which contradicts the findings of that Court, and which shows that the findings on which it relied were based upon false representations of the prosecution.

This Court in *Harris* v. *United States, supra,* recently stated the essential nature of the required hearing in a contempt case:

> "If justice is to be done, a sentencing judge should know all the facts . . . Our point is that a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice. Then courts will not act on surmise or suspicion but will come to the sentencing stage of a proceeding with insight and understanding." 328 U. S. at 166-67, 86 S. Ct. at 355.

Three purposes are served by the hearing envisioned in the *Harris* decision. Only a full and open hearing in the District Court at which all the relevant evidence is adduced and examined guarantees the defendant in a contempt proceeding the procedural due process to which he is entitled. Before reaching a valid determination in a contempt proceeding the District Court must consider all the relevant evidence so adduced and tested. After making a determination that the defendant is in fact a contemnor, the District Court should consider all the evidence to determine what measure of sanction is appropriate. None of these purposes was served by the proceeding in the courts below:

(a) The contempt judgment should not have been sustained on evidence not before the District Court.

The District Court held:

> "Petitioner, a Swiss citizen, was personally served in New York City on April 28, 1966 with a Grand Jury subpoena returnable on the 29th before the April Grand Jury. He appeared on that date, and was directed by the Grand Jury foreman to reappear before the May Grand Jury on May 2, 1966." 262 F. Supp. at 708.

The District Court which conducted the "hearing" was led to this conclusion by representations made by the prosecution.

The District Court also sustained its jurisdiction over petitioner by holding, again on the representations and sworn statements of the prosecutors, that the original grand jury subpoena served upon petitioner on April 28, 1966, which brought him before the April special grand jury on April 29, 1966, was continued in force by adjournments of that subpoena by the April special grand jury and the May regular grand jury in each of petitioner's appearances before the respective grand juries on April 29, May 2, 6 and 10, 1966. The District Court concluded on the evidence before it:

> "In sum, the failure of petitioner to appear on May 31, 1966 flouts the lawful process of this Court and is contemptuous." 262 F. Supp. at 711.

The minutes of petitioner's grand jury appearances were at no time produced before the District Court.

When this case came before the Court of Appeals the panel requested the prosecutors to produce those portions of the grand jury minutes which purported to deal with

the adjournment of the original and only subpoena served on petitioner and the directions to him to appear before the successive grand juries on each occasion.* When those minutes were produced, they revealed that at the conclusion of the April 29, 1966 appearance before the April special grand jury, which was the only appearance for which a subpoena had been issued, the following occurred:

> "Mr. Allee [Assistant United States Attorney]: Mr. Foreman, could you direct the witness to return here at ten o'clock on Monday morning.
>
> Foreman: You are directed to return to this hearing on Monday morning.
>
> Witness: Yes, sir." (Appendix G, p. 24a, *infra*)

The minutes of the April special grand jury for that Monday morning, May 2, 1966, reflect at the conclusion of the proceedings the following:

> "Mr. Allee [Assistant United States Attorney]: Mr. Foreman, may the witness be directed to appear here again Friday at ten o'clock.
>
> Foreman: The witness is excused, but directed to return here at ten o'clock on Friday of this week—the 5th is that?
>
> Mr. Allee: The 6th.
>
> Foreman: Next Friday, the 6th?
>
> Mr. Allee: Yes.
>
> Foreman: Yes, May 6th.
>
> Mr. Allee: You're excused until May 6th." (Appendix G, p. 26a, *infra*)

The minutes of the April special grand jury for May 6, 1966 again reflect that petitioner appeared before that

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* These grand jury minutes are reproduced in Appendix G bound with this petition at pp. 23a-27a.

grand jury and at the conclusion of his appearance the following occurred:

> "Mr. Leval: All right. May the Foreman please direct the witness to return before this Grand Jury on this coming Tuesday, which is the earliest available date; Tuesday—that's the 10th of May— at 10:00 A.M., and may the witness be excused now until such time.
>
> Foreman: You're excused until the 10th of May." (Appendix G, p. 27a, *infra*)

The Grand Jury minutes for May 10, 1966 show that petitioner was not taken by the prosecutor before the April special grand jury, but before the May regular grand jury despite the previous direction of the foreman of the April regular grand jury that petitioner was to appear before that body. The excerpts of the minutes of the May 10, 1966 appearance show that petitioner was resworn by the foreman although there was no subpoena requiring his appearance before the May regular grand jury and after his testimony the following occurred:

> "Mr. Allee [Assistant United States Attorney]: Mr. Foreman, could you instruct the witness to return here at 10 o'clock on the 31st of May.
>
> Foreman: Did you hear the instruction, sir? Would you return on that date and at that time?
>
> Witness: Yes, sir. On the 31st of May at 10 o'clock in the morning?
>
> Mr. Allee: That is right. And that the subpoena is adjourned until that time.
>
> Witness: Thank you, sir." (Appendix G, p. 27a, *infra*)

These grand jury minutes which were first produced before the Court of Appeals led that Court to affirm the judgment of contempt on a totally different ground than that which had impelled the District Court to hold petitioner in contempt.*

> "Once the witness has appeared before the grand jury . . . . of his own volition, the witness is subject to the orders of the grand jury . . . they have the power to direct the witness to return at a stated time just as they have the power to administer an oath." 370 F. 2d at 1021.

Since the grand jury minutes had not been before the District Court which had held the "hearing" on the contempt proceeding, petitioner and counsel, had he been granted the right to counsel, had no opportunity to meet this evidence, cross examine the witness through which it was introduced or explain its import, or lack thereof, to the District Court. Yet, the Court of Appeals affirmed the judgment of contempt without remanding the case for a further hearing although it was the District Court and not the Court of Appeals which had the power and responsibility to determine the facts of the case, whether or not petitioner was in contempt, and if it decided he was in contempt what penalty should be imposed.

In *Spevack* v. *Klein*, 385 U. S. 511, 87 S. Ct. 625 (1967), this Court held that an appellate court may not affirm a judgment on a theory not considered by the trial court which is supported, if at all, on evidence which had not

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* The grand jury minutes of petitioner's May 10th grand jury appearance are quoted in the Court of Appeals opinion. 370 F. 2d at 1022.

been considered by the trial court.* *Spevack* v. *Klein*, *supra*, relied upon *Cole* v. *Arkansas*, 333 U. S. 196, 201, which in turn cited *In re Oliver*, 333 U. S. 257, 68 S. Ct. 499 (1948). *Oliver* overturned a contempt conviction which had been based on grand jury minutes which were not in the record at the time of the hearing on the contempt proceedings. 333 U. S. at 277, 68 S. Ct. at 509. As also reflected in this Court's decision in *Harris*, *supra*, the function of a public hearing in a contempt proceeding is to guarantee that a contempt judgment will not be entered on evidence which is not a matter of record in that proceeding. 333 U. S. at 269 n.22, 68 S. Ct. at 505 n.22; see also *In re Michael*, 326 U. S. 224, 226-27, 66 S. Ct. 78, 79 (1945).

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* In *Spevack*, this Court held that the Court of Appeals of the State of New York could not sustain a disbarment on the ground that the records which the attorney has refused to produce pursuant to a subpoena *duces tecum* were required records and therefore not privileged when the Appellate Division had based its order of disbarment not on that ground but upon a ruling that an attorney in disciplinary proceedings had no right to invoke his Constitutional privilege against self-incrimination. This Court stated:

> "Petitioner, however, had been disbarred on the theory that the privilege was applicable *to the records*, but that the invocation of the privilege could lead to disbarment. His disbarment cannot be affirmed on the ground that the privilege was not applicable in the first place. *Cole* v. *Arkansas*, 333 U. S. 196, 201 . . . For that procedure would deny him all opportunity at the trial to show that the Rule, fairly construed and understood, should not given such a broad sweep and to make a record that the documents demanded by the subpoena had no 'public aspects' within the required records rule but were private papers." 385 U. S. ——, 87 S. Ct. 629-30.

(b) The grand jury minutes introduced before the appellate court demonstrated that the basic findings of the District Court were erroneous.

As the Court of Appeals recognized in its opinion, 370 F. 2d at 1021-22, the District Court's findings upon which it relied to sustain its judgment of contempt were swept away by the evidence of the grand jury minutes which were introduced for the first time before the Court of Appeals. Those minutes show that there had been no adjournment of or attempt to adjourn the subpoena of April 28th on the appearance which it called for, April 29th, or on the successive appearances of May 2nd and May 6th. Those minutes also show that there had been no direction of the foreman of the April special grand jury that petitioner, pursuant to the subpoena or otherwise, appear before the May regular grand jury. Those minutes also show that on May 6, 1966, petitioner was instructed by the foreman of the April special grand jury to appear before that grand jury on May 10, 1966 instead of which he was at the instance of the prosecutor taken before the May regular grand jury and it was the *foreman of the May regular grand jury* who directed petitioner to appear on May 31, 1966, which resulted in the contempt proceeding. There was no opportunity for petitioner or counsel to press this contradiction of the District Court's basic findings upon that Court because the minutes which were in the possession and control of the prosecution pursuant to Rule 6 of the Federal Rules of Criminal Procedure were not adduced until after oral argument in the Court of Appeals. Nonetheless, the Court of Appeals on a wholly different record than that before the District Court affirmed the judgment of contempt.

This procedure plainly offends the principle established for contempt cases by this Court in *Harris* v. *United*

States, supra, In re Oliver, supra, and also results in the same type of denial of due process and the right to be heard which resulted in this Court's reversal in *Spevack* v. *Klein.*

(c) The evidence relied upon by the District Court was incorrect within the knowledge of the prosecution.

Recently and consistently this Court has held that a judgment obtained by the prosecutor's knowing use of false evidence is Constitutionally invalid. *Miller* v. *Pate,* —— U. S. ——, 87 S. Ct. 785, 788 (1967), and cases there cited. In the District Court the two prosecutors consistently and repeatedly misrepresented to the District Court that (a) the April 28, 1966 subpoena which brought petitioner before the April special grand jury on April 29th had been adjourned on that appearance and on each of petitioner's successive appearances by the foreman of that grand jury and the foreman of the May regular grand jury, and (b) that petitioner's appearance before each of the successive grand juries was pursuant to the direction of a grand jury foreman. In making its basic findings of fact and reaching its conclusions therefrom, the District Court relied upon statements in affidavits and memoranda submitted by the prosecutors:

> "4. On April 28, 1966, a Special Agent of the Internal Revenue Service, finding Walter Germann at the Hotel Carlyle in New York City, New York, duly served on him a Grand Jury subpoena commanding his appearance before the Grand Jury of the United States District Court for the Southern District of New York on April 29, 1966. Pursuant to that subpoena, Mr. Germann appeared before the Grand Jury on April 29, 1966. His subpoena was then adjourned by the Foreman of the Grand Jury and he was directed to reappear. Pursuant to this proce-

dure, Mr. Germann reappeared before the Grand Jury on May 2, 6 and 10, 1966. These appearances were before the April Additional Grand Jury and the May Regular Grand Jury" (Prosecutor's affidavit opposing motion to vacate contempt judgment in the District Court; App. 64a-65a)

* * * *

"the Grand Jury issues subpoenas under the authority of the Court, and . . . the Grand Jury, 'being an arm of the district court,' . . . invokes the Court's authority in adjourning such subpoenas and directing the reappearance of witnesses.

The District Court subpoenas served on Germann a few days earlier remained in force by virtue of its adjournments in the Grand Jury." (Id. at App. 69a-70a)

* * *

"Equally preposterous is the notion that courts do not have inherent power to permit grand juries to make reasonable adjournments of the courts' process." (Prosecution's memorandum in the District Court; App. 143a)

* * *

"The authority of grand jury foremen to adjourn the process made available to it by this Court is not only dictated by reason and common sense, but is confirmed by tradition—a tradition which is highly revelant in determining the powers of federal grand juries." (Id. at App. 145a)

The two prosecutors who presided at the contempt proceeding were the same prosecutors who were present before the grand jury and conducted its investigation on each of petitioner's grand jury appearances. The minutes of

those appearances were withheld by the prosecution from the District Court. When they were belatedly produced before the Court of Appeals, they showed that the prosecutors' representations on which the District Court had relied were false in that (a) the grand jury foreman did not purport to adjourn the original subpoena which was *functus officio* on April 29, 1966 and (b) the foreman of the April special grand jury on May 6, 1966 requested petitioner to appear before that grand jury on May 10, 1966, but on the latter date the prosecutors took petitioner before another grand jury.

In *Miller* v. *Pate, supra,* this Court could not tell from the record what effect the false evidence used in that case actually had on the judgment because the fact finder there was a jury. In this case, we know what the effect of the "evidence" known to be false had on the contempt judgment because it is directly reflected in the basic findings in the opinion of the District Court. The District Court held that it had jurisdiction over petitioner because the April 28, 1966 subpoena had been continued in effect by

> "the express direction of the foreman commanding [petitioner's] reappearance.
>
> "We note, too, that the affidavits submitted by the Government attest to the long standing practice in this district with respect to using one subpoena, as here, to compel the attendance of the witness at meetings of the Grand Jury." 262 F. Supp. at 710.

The District Court also found that petitioner was properly brought before the May regular grand jury because the foreman of the April special grand jury had directed petitioner to appear before the May regular grand jury. 262 F. Supp. at 708. Both of these findings which were basic to the contempt judgment were shown to be erroneous by

the belated production of the grand jury minutes at the direction of the Court of Appeals. Those minutes also demonstrated that the prosecution herein knew that its representations to the District Court in regard to petitioner's appearances before the grand jury were false at the time those representations were made.

It cannot be presumed that the District Court, had the actual facts been presented to it and had it known the prosecution's representations were false, would have nonetheless held petitioner in contempt. To indulge in such a speculation violates the principles which this Court has many times stated should govern contempt and other prosecutions. *Harris* v. *United States, supra; In re Oliver, supra; In re Michael, supra; Spevack* v. *Klein, supra; Miller* v. *Pate, supra.*

4. The District Court had neither jurisdiction over petitioner nor the power to enter the judgment herein.

Each of the courts below ignored the fact that petitioner as a citizen and resident of Switzerland was a non-resident alien insofar as the courts of this country are concerned. In so doing, they failed to give effect to this Court's decision in *Blackmer* v. *United States,* 284 U. S. 421, 52 S. Ct. 252 (1932).

In *Blackmer,* as below, it was alleged that the defendant failed to honor a lawful direction to appear—before the court in *Blackmer,* before the grand jury below. Jurisdiction was sought in each case by service of an order to show cause beyond the territorial limits of the United States. The contempt jurisdiction in *Blackmer* was sustained by this Court under what is now 28 U. S. C. §1784, which is the only statute which purports to allow such service in a contempt proceeding. At the time of *Blackmer* and now, that statute is restricted in its application to "a national

or resident of the United States who is in a foreign country". 28 U. S. C. §1783(a).* Although Blackmer was a resident of France, this Court found the application of the procedures of what is now Section 1784 to him while he was abroad conformed to the commands of the Constitution and did not offend the law of nations since,

> By virtue of the obligations of citizenship, the United States retained its authority over him and he was bound by its laws made applicable to him in a foreign country . . . With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the *duties of the citizen in relationship to his own government.* 284 U. S. at 436-37, 52 S. Ct. at 254. (Emphasis added)

Given the obligations of citizenship, it was proper for Congress to extend the jurisdiction of the Federal courts beyond the territorial limits of the United States:

> "While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power." 284 U. S. at 437, 52 S. Ct. at 254-55.

Absent the obligation of citizenship, or residence, Congress has no such power and, indeed, in 28 U. S. C. §§1783, 1784, Congress did not attempt to exercise extra-territorial jur-

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* At the time of Blackmer, the statute read:

"a citizen of the United States or domiciled therein." 284 U. S. at 434, 52 S. Ct. at 253-54.

isdiction over non-resident aliens in contempt cases. As Congress made no such attempt, it did not provide a mechanism or procedure for obtaining service upon or jurisdiction over a non-resident alien in a contempt proceeding while he was in the country of his nationality and residence.

In the present case jurisdiction was exerted over petitioner by the mailing of a copy of the order to show cause to him in Basel, Switzerland.* There is no statute or rule which even purports to allow such a procedure where a non-resident alien is concerned. There would be no authority in our Constitution or in the principles of international law for the establishment of such a procedure.

If all that need be done to obtain personal jurisdiction over an absent non-resident alien is what was done in this case, there are few, if any, inhabitants of the globe who are not within the jurisdiction of any Federal District Court. See *McCulloch* v. *Sociedad Nacional, etc.*, 372 U. S. 10, 20, 83 S. Ct. 671, 677 (1963); *Lauritzen* v. *Larsen*, 345 U. S. 571, 578, 73 S. Ct. 921, 926 (1953); *Foley Bros.* v. *Filardo*, 336 U. S. 281, 284-85, 69 S. Ct. 575, 577 (1949). Yet, this Court held on firm ground in *Blackmer* that *in personam* jurisdiction over persons resident abroad may be obtained in contempt proceedings only if they are citizens:

> "The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned is a jurisdiction in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them." 284 U. S. at 438, 52 S. Ct. at 255.

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* The invalidity of the attempt to gain jurisdiction over him by service of a copy of the order to show cause on a New York attorney has been demonstrated under heading "2" hereinabove.

This Court in *Shillitani* v. *United States*, 384 U. S. 364, 86 S. Ct. 1531, 1535 n.4 (1966), relied on the statement of the Assistant United States Attorney prosecuting the contempt as to the purport of the contempt order issued in that case. In the present case the statement of the prosecutor also reveals the purpose of the order entered against the petitioner below.* That purpose was to use the Court's order as process to compel petitioner to come from his home in Basel to testify in the Federal District Court for the Southern District of New York before a grand jury. There is no statute or rule providing authority for the use of such "process" on a non-resident alien. The Court of Appeals upheld this procedure on the ground that petitioner had previously been within the territorial jurisdiction of the District Court and had been subpoenaed. The decisions of the District of Columbia Circuit, *Gillars* v. *United States*, 182 F. 2d 962, 978 (D. C. Cir. 1950); *Burgman* v. *United States*, 188 F. 2d 637, 639 (D. C. Cir. 1951); the First Circuit, *United States* v. *Best*, 76 F. Supp. 138, 139 (D. Mass. 1948), affd. 184 F. 2d 131 (1st Cir. 1950); and the 9th Circuit, *Iva Ikuko Toguri D'Aquino* v. *United States*, 192 F. 2d 338, 375 (9th Cir. 1951); *Merino* v. *United States Marshal*, 326 F. 2d 5, 13 (9th Cir. 1963); are to the contrary and are based on this Court's decision in *Blackmer* v. *United States, supra*. The decision in *Gillars* graphically reflects the error below. A witness for the defense, a citizen and resident of Germany, was before the District Court but was allowed to return home during the course of the trial. Even though Gillars claimed that the departed witness was essential for his defense to the criminal charges against him, the Court of Appeals upheld his con-

* "We are not trying to punish Mr. Germann for anything. We are really trying to invoke the process of this Court to compel his appearance." (App. 21a).

viction because there was no power in the District Court to compel the reappearance of the German witness. 182 F. 2d at 978. It is respectfully submitted that this conflict between the Second Circuit and the other Circuits should be resolved, particularly in view of the jurisdictional nature of the issue.

The decisions below erroneously compelled petitioner to appear before a grand jury here to give testimony and produce documents, the revelation of which would have subjected him to criminal prosecution in Switzerland. On May 31, 1966, the date petitioner had been requested to return to the grand jury, he caused to be sent to the prosecutor a telex message* stating that he could not appear because he had been advised by counsel that the questioning to which he would be subjected would force him to violate Swiss law in respect to banking secrecy and economic espionage.** As the District Court held no hearing on the claimed violation of Swiss law, it must for the purposes of appellate review be assumed that that claim was established. *Golden* v. *United States*, 318 F. 2d 357, 363 (1st Cir. 1963).

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* "I am sorry to inform you that, after testing my conscience and weighing my responsibilities, and after taking the best legal advice I could have found, I will not appear today Tuesday 31st. There is an acute conflict of law between our two countries and the unlimited scope of the questioning would force me to continuously violate Swiss law both on banking secrecy and economic espionage. As I am a Swiss citizen I will obey the Swiss laws first as the United States expect their citizens to obey their laws first. Please advise the competent authorities and express my apologies." (App. 111a).

** At the "hearing" on the order to show cause, this message was not presented to the Court and was in fact misrepresented to the Court as "something to the effect that he was aware of the consequences under the American law of his act and he had decided on advice of counsel that he would not appear." (App. 36a).

In the *Societe Internationale, etc.* v. *Rogers,* 357 U. S. 197, 78 S. Ct. 1087 (1958), this Court held that sanctions ought not to be imposed by a Federal court on a foreign litigant who was unable to make a disclosure ordered by the court because that disclosure would cause him to violate foreign law. There, as here, the foreign statutes considered were the Swiss secrecy laws. 357 U. S. at 208, 211, 78 S. Ct. at 1094, 1095. This Court said:

> "Here the findings below establish that the very fact of compliance by disclosure of banking records will itself constitute the initial violation of Swiss laws. In our view, petitioner stands in the position of an American plaintiff subject to criminal sanctions in Switzerland because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws. Petitioner has sought no privileges because of its foreign citizenship which are not accorded domestic litigants in United States courts." 357 U. S. at 211-12, 78 S. Ct. at 1095.

See also *Banco National de Cuba* v. *Sabatino,* 376 U. S. 398, 436-37, 84 S. Ct. 923, 944-45 (1964); *Murphy* v. *Waterfront Commission,* 378 U. S. 52, 84 S. Ct. 1594 (1964). The decisions below are in direct conflict with these principles. The contempt judgment not only subjects petitioner to a large penalty for obeying the laws of Switzerland, the country of his residence and citizenship, its affirmance by the courts below after this problem was brought to their attention directly disregards and largely nullifies the application of Swiss law to one of its own citizens.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS BENDER,
225 Broadway,
New York, N. Y.,
Counsel for Petitioner.

LLOYD A. HALE,
New York City,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 260, DOCKET 30848

UNITED STATES OF AMERICA,
Appellee,

v.

WALTER GERMANN,
Appellant.

Argued Nov. 29, 1966. Decided Jan. 12, 1967.

John S. Allee, Asst. U. S. Atty., New York City (Robert M. Morgenthau, U. S. Atty. for the Southern District of New York, and Pierre N. Leval, Asst. U. S. Atty., New York City, on the brief), for appellee.

Louis Bender, New York City (Lloyd A. Hale, New York City, on the brief), for appellant.

Before LUMBARD, Chief Judge, and FRIENDLY and SMITH, Circuit Judges.

LUMBARD, Chief Judge:

This appeal raises the question whether a witness before a grand jury is in disobedience of the commnad of the district court, in violation of 18 U. S. C. §401, when he fails

to return for further questioning at a time expressly directed by the foreman of that grand jury and recorded in the grand jury's minutes. We hold that he is in disobedience and we affirm the order of the district court which adjudged him in civil contempt and imposed a fine, after a hearing held in his absence as he had advised the court that he was in Switzerland and did not intend to appear.

Walter Germann appeared before the April Special and May Grand Juries in the Southern District of New York on April 29, May 2, May 6 and May 10, 1966. At the end of each session he was orally instructed when next to appear.[1] The grand juries were investigating various international holding companies owned by Germann and others to determine whether these corporate entities were being used to evade the laws of the United States relating to income tax and regulation of securities. He was specifically instructed on May 10 to return on May 31 but he failed to appear; his attorney informed the United States Attorney that Germann had cabled that he had decided not to appear.

The government, on July 13, 1966, moved by order to show cause to hold Germann in contempt. The motion was served on Germann's attorney, returnable on August 1.

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[1] Germann was initially served by subpoena in New York on April 28, 1966, which ordered him to report before the grand jury on April 29, 1966 at 10:00 A.M., subject to contempt of court for failure to comply. The subpoena instructed him "not to depart the Court without leave thereof, or of the United States Attorney." Subpoenas are made freely available in blank form by the court so that the United States Attorney may simply fill in the name of the party, the place, date and time of the inquest, the nature of the investigation, and sign it at the bottom. See Rule 17(a), Federal Rules of Criminal Procedure.

Appendix A

Copies of the papers were sent by certified mail to Germann in Basel and cabled to him by his attorney. Germann secured an adjournment to August 15 through new counsel, who retired a few days later but cabled Germann that the government would not agree to any further adjournment. On August 15 a third attorney appeared only for the purpose of requesting an additional adjournment. Judge Cooper granted the request for adjournment as to the criminal contempt but denied it as to the civil contempt and proceeded to hear the government's motion.

Following a hearing which neither Germann nor his counsel attended, although they had been duly advised thereof, Judge Coper held Germann in civil contempt for his failure to appear before the grand jury on May 31, 1966. He directed that if Germann did not appear before the grand jury on or before August 22, 1966, he must pay a fine of $25,000 and an additional $1,000 for each additional day thereafter until he appeared.[2]

Thereafter, on September 27, after the court had heard arguments and received briefs on an order to show cause obtained by Germann's fourth counsel to vacate the August 15 judgment of contempt, Judge Cooper denied the motion to vacate, but he stayed the daily accumulation of the fine beyond the amount already determined on September 27, provided that Germann filed his notice of appeal and filed his brief on appeal and moved for a preference according to a schedule, all by October 27, 1966. It is from these two orders of the Southern District entered on August 15 and September 27, 1966 respectively that this appeal is taken.

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[2] The order stated the place and times of the grand jury's normal business hours, Monday through Friday from 10:00 A.M. to 12:45 P.M. It also enjoined Germann from transferring any assets out of the court's jurisdiction pending further hearing.

Appendix A

Germann contends that he did not violate any process or order of the district court and thus he could not be held in contempt. The record is clear that on May 10, 1966 he was instructed by the foreman of the May grand jury to return on May 31 and that he agreed to do so. However, he argues that a foreman of a grand jury has no power to command his return at a later time and this oral command by the foreman was not "process" within the meaning of 18 U. S. C. §401(3) or an order or command of the court. We disagree.

[1] It is implicit in the operation of the grand jury as an arm of the district court under Rule 6, Federal Rules of Criminal Procedure, see e.g., Levine v. United States, 362 U. S. 610, 617, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960), that the attendance of witnesses before a grand jury may be directed by the foreman or deputy foreman of that grand jury. Once the witness has appeared before the grand jury, whether pursuant to subpoena or of his own volition, the witness is subject to the orders of the grand jury. The grand jury acts through its foreman or deputy foreman; they have the power to direct the witness to return at a stated time just as they have the power to administer an oath. It is true that the power to administer an oath or an affirmation is explicitly provided in the Federal Rules of Criminal Procedure, Rule 6(c), whereas there is no provision which specifically confers any power that the grand jury may direct further appearance of the witness.

However, the power to administer an oath and question a witness would be hollow indeed if it did not include as well the power to continue the appearance and questioning of the witness until his testimony had been completed or the need for his appearance had terminated. On many occasions the questioning of a witness cannot be completed at

one sitting because of the complexity of the inquiry or because the witness must consult records or otherwise refresh his memory. That was the situation with Germann's appearance. In such cases it is customary for the foreman of the grand jury to direct the witness to return for further examination at a later session of the grand jury. This was done when Germann appeared before the May grand jury on May 10. After Germann had been sworn and had made a statement to the jury—which he had requested the opportunity to do—the grand jury minutes record the following:

> "Mr. Allee: Mr. Foreman, could you instruct the witness to return here as 10 o'clock on the 31st of May.
>
> Foreman: Did you hear the instruction, sir? Would you return on that date and at that time?
>
> Witness: Yes, sir. On the 31st of May at 10 o'clock in the morning?
>
> Mr. Allee: That is right. And that the subpoena is adjourned until that time.
>
> Witness: Thank you, sir."

Germann asserts that the power to command his return could be exercised only by service of a subpoena signed by the United States Attorney under the Federal Rules or by direction of a judge of the court. It is sufficient answer that if the United States Attorney can compel the original attendance by signing a subpoena and causing it to be served on the witness, it would be an absurd interpretation of the rules and the power of a district court to hold that a grand jury acting through its foreman could not direct the further attendance of the witness when the witness is present before it. Here the foreman gave such a direction and a

simultaneous record of what occurred was made by the grand jury stenographer.

While there is no reported opinion affirming this power of the grand jury, we think it more in point that it had been the practice for many years prior to enactment of the Federal Rules for grand juries in the Southern District and in other districts to give such directions and to record them in their minutes. This practice has continued since the adoption of the Federal Rules. Until this case no one has ever questioned it and obviously it was considered unnecessary to spell it out in the Federal Rules when they were drafted, 1941-1946.[3]

[2] Nor is it material that Germann's first three appearances, on April 29, May 2 and May 6, were before a different grand jury, the April Special Grand Jury. Germann's counsel then asked that his examination be expedited so that Germann could return to Switzerland as soon as possible. The adjournment from May 6 to May 10 was arranged by consent. Germann voluntarily appeared, with his counsel in attendance, and was sworn and testified on May 10 before the May Regular Grand Jury which was also investigating possible illegal activity of holding companies owned by Germann and others. Apparently Germann was taken before the second grand jury as this was more convenient for all concerned on May 10. No objection was made to this; it was done principally to serve Germann's convenience and the adjournment from May 10 to May 31 was at his request and with his consent.

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[3] George Z. Medalie who was United States Attorney for the Southern District of New York, 1931 to 1933, was a member of the committee which drafted the Federal Rules of Criminal Procedure.

Appendix A

[3] Germann also urges that the district court had no jurisdiction to compel the appearance of a non-resident alien. Of course there is no power to compel such a witness to come from abroad. But anyone within the jurisdiction of the court may be subpoenaed and once jurisdiction thus attaches the court, acting through the grand jury, has the power to direct further appearances during its investigation and until the witness has been excused. It makes no difference where he is resident or of what country he is a citizen. Germann was served by subpoena in New York; he appeared on four occasions before the grand jury sitting in New York; the order which he deliberately disobeyed was given in New York.

As we have shown above, it is enough that Germann was in attendance before the May grand jury, that he was instructed by the foreman to return at a particular time, that he understood this and that he deliberately refused to return. The appellant's other contentions do not merit discussion. Germann was properly held to be in contempt and the provisions of the order were appropriate.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of January one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD, Chief Judge,
HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
Circuit Judges.

IN THE MATTER

OF

A Grand Jury Subpoena Served on WALTER GERMANN,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

WALTER GERMANN,

Appellant.

PETITION FOR HEARING IN BANC

Louis Bender and Lloyd A. Hale,
New York, N. Y., for appellant.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

J. EDWARD LUMBARD,
Chief Judge

17 February 1967

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

WALTER GERMANN,

Appellant.

PETITION FOR REHEARING AND ALTERNATIVE MOTION FOR STAY OF THE MANDATE

Louis Bender and Lloyd A. Hale,
New York, N. Y., for appellant.

The petition for rehearing is denied; the motion for a stay is denied.

J.E.L.
H.J.F.
J.J.S.
U.S.C.J.J.

Feb 17 1967

APPENDIX E

In the Matter of a Grand Jury Subpoena
Served on Walter GERMANN

United States District Court
S. D. New York

Sept. 27, 1966

No. M 11-188.

MEMORANDUM

PER, District Judge.

his motion seeks to vacate, pursuant to Rule 60(b) (4), R. Civ. P. and Rule 57(b), F. R. Crim. P., this Court's gment of August 15, 1966 finding petitioner in civil con- pt for his failure to appear before the Grand Jury on y 31, 1966.

n July 13, 1966, by order to show cause, the Government ed to hold petitioner in contempt. A hearing was held re this Court on August 15, 1966. Petitioner, though iving notice thereof, did not attend. The basic facts ound by the Court are not in dispute.

etitioner, a Swiss citizen, was personally served in New k City on April 28, 1966 with a Grand Jury subpoena rnable on the 29th before the April Grand Jury. He eared on that date, and was directed by the Grand Jury man to reappear before the May Grand Jury on May 2, . Petitioner complied with this direction. He next ap- ed on May 6 and 10th, each time pursuant to the oral tion of the foreman of the May Grand Jury.

uring the course of such proceedings, petitioner asserted without the benefit of certain books and records located

in Switzerland, he was unable to provide the Grand Jury with certain information it sought to elicit. Petitioner was thereupon granted permission to return to Switzerland to examine the relevant records and return before the Grand Jury for a continuance of his testimony. In accordance with that understanding and by mutual consent, on May 10, 1966 the foreman again orally directed him to reappear on May 31, 1966.

Despite the foreman's order and petitioner's promise to reappear on May 31st, he purposely failed to do so. Instead, petitioner on May 31st sent his New York attorney, Richard Wels, Esq., the following telegram:

> I am sorry to inform you that, after testing my conscience and weighing my responsibilities, and after taking the best legal advice I could have found, I will not appear today, Tuesday 31st. There is an acute conflict of law between our two countries and the unlimited scope of the questioning would force me to continuously violate Swiss law both on banking secrecy and economic espionage. As I am a Swiss citizen I will obey the Swiss laws first as the United States expect their citizens to obey their laws first. Please advise the competent authorities and express my apologies.

By order to show cause, signed July 13, 1966 and returnable August 1, 1966, the Government moved to hold petitioner in contempt. A copy of this order with its supporting affidavit was served on Mr. Wels, whose firm accepted service on July 13, 1966. In addition, a copy was sent by certified mail to petititioner's address in Basel, Switzerland. Affidavit of Assistant United States Attorney John S. Allee, sworn to September 7, 1966, ¶ 6.

However, by letter dated July 21, 1966, petitioner discharged Mr. Wels with respect to the Grand Jury proceedings, apparently because of a difference of opinion as to his failure to appear. Petitioner then retained the firm of Donovan, Leisure, Newton & Irvine, Esqs. to represent him. Thereafter, the Government consented to adjourn the hearing to August 15, 1966, although counsel had asked for at least a month's adjournment. On August 4, 1966 the Government was advised that this firm would no longer represent petitioner, Mr. George S. Leisure, Sr., of counsel, cabled petitioner on August 5, 1966 that the hearing, nevertheless, would take place on August 15, 1966 as scheduled. Affidavit of Assistant United States Attorney John S. Allee, sworn to September 7, 1966, ¶ 7.

On August 15, 1966, Mr. Green, an attorney with the firm of Baker, McKenzie & Hightower, Esqs. stated in open Court that his firm had been recently approached in connection with representing petitioner, and requested an adjournment to September 6th in order to decide whether to undertake the defense. The Court denied this request. Mr. Green did not appear for petitioner; he remained in the courtroom on that day as a spectator.

At the close of the Government's evidence, we found petitioner in civil contempt for wilfully and knowingly failing to appear on May 31st in response to a lawful direction of the foreman. It was the order of this Court on August 15th that unless petitioner appeared before the Grand Jury on or before August 22, 1966 he would be subject to a fine of $25,000 and a further fine of $1,000 for each day thereafter that he failed to appear.

[1] Petitioner raises several arguments in support of vacating the judgment of this Court. In essence, he argues

that: (1) the order to show cause of July 13, 1966 was improperly served; (2) there was a denial of petitioner's right to counsel; (3) the Court lacked jurisdiction over petitioner.[1]

Improper Service

Petitioner contends that the order to show cause of July 13, 1966 was jurisdictionally defective in that it was not personally served upon him. His argument is without merit.

[2] When the subpoena of April 28, 1966 was personally served upon him, the jurisdiction of this Court was established. The order to show cause was not a new order, requiring additional personal service of process. It brought on a proceeding merely "* * * ancillary to the grand jury hearing and designed as an aid to it." Harris v. United States, 382 U. S. 162, 165, 86 S. Ct. 352, 354, 15 L. Ed. 2d 240 (1965). Thus, service could properly be made upon petitioner or his attorney. Rule 5, F. R. Civ. P.; Tilghman v. Tilghman, 57 F. Supp. 417 (D. C. 1944); Government's

[1] The Government makes the threshold argument that petitioner must personally appear before this Court in order to attack the validity of the Court's order on other than jurisdictional grounds. See In Re Thompson, 213 F. Supp. 372 (S. D. N. Y. 1963), reversed on other grounds, U. S. v. Thompson, 319 F. 2d 665 (2d Cir.); In Re Stern, 235 F. Supp. 680 (S. D. N. Y. 1964). To allow otherwise, says the Government, is to permit petitioner to maintain a "heads I win, tails you lose" status, because he had rendered the Court powerless to enforce its judgment against him if his contentions are found to be without merit. We reject this argument, for we note that petitioner allegedly has assets within the jurisdiction that are subject to the Court's order. Furthermore, the fact that petitioner's credit standing, not only locally but internationally, could be affected by our order, should give him standing to raise all arguments through his attorney.

Memorandum, page 18. In the instant case both methods were used, giving petitioner adequate notice of the hearing.[2]

Indeed, petitioner does not contend, nor could he, that he did not have actual notice of the hearing on August 15, 1966. The fact that the notice contained within the order to show cause, at least on its face, might have been inadequate for the purpose of criminal, but not civil, contempt is, of course, irrelevant.

Right to Counsel

[3, 4] Petitioner argues that he was denied his right to counsel. Of course, a person subject to contempt proceedings has a constitutional right to be represented by counsel. But the mere fact that petitioner was not represented at the hearing of August 15, 1966 does not constitute per se a denial of this right. The record before us is barren of any evidence indicating a denial of counsel or that there was inadequate time to obtain counsel if desired.

Obligation to Reappear

Petitioner's main contention is that he fully complied with the April 28, 1966 subpoena when he appeared on April 29th, the return date specified therein. Since no additional subpoena commanding his reappearance on the 31st

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[2] Petitioner's contention that Mr. Wels was not his attorney is belied by the latter's affidavit. While Mr. Wels did not appear with petitioner at the Grand Jury proceedings, he represented him in several respects until he was notified of his discharge some days after service was accomplished. Affidavit of Mr. Wels sworn to September 12, 1966.

had been served,[3] he contends that he was under no legal obligation to reappear on that date. We cannot agree.

[5] Petitioner relies heavily on New York case law holding that a grand jury witness is compelled to appear only on the date stated in the subpoena. New York does not consider a foreman's "order" to reappear at a subsequent time a "process" or "mandate" of the Court punishable by contempt for noncompliance. Matter of Spector v. Allen, 281 N. Y. 251, 22 N. E. 2d 360 (1939); Matter of Mullen v. Halleran, 177 Misc. 734, 31 N. Y. S. 2d 710 (1941). He urges that the similarity of the New York and federal contempt statutes makes the New York cases especially persuasive. See Local Civil Rule 15. However, whether the subpoena is "spent" once the witness makes his appearance, or can be continued to compel attendance, is determined by the subpoena, not the contempt, statute. Matter of Mullen v. Halleran, 177 Misc. 734, 31 N. Y. S. 2d 714.

In the instant case, the original subpoena dated April 28, 1966, calling for petitioner's appearance distinctly states "* * * and not to depart the Court without leave thereof, or of the United States Attorney."

Unlike the New York practice, under federal law prior to the promulgation of the Federal Rules, a subpoena, once served, compelled the witness to appear, not merely on the specific date ordered, but "* * * to remain in attendance until excused by the court or by the government's representatives." Blackmer v. United States, 284 U. S. 421, 443,

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[3] The fact that petitioner had previously appeared before the April Grand Jury could not affect the power of the May Regular Grand Jury to command his reappearance on the 31st. It is not controverted that both Grand Juries were concerned with similar investigations, or that petitioner objected to his appearance before that body.

52 S. Ct. 252, 257, 76 L. Ed. 375 (1932); See United States v. Van Duzee, 52 F. 930 (8 Cir. 1892). The continuing nature of the subpoena was expressly recognized by the subpoena statute in force at the time of the *Blackmer* case. Section 655, 28 U. S. C. stated that a witness was "* * * not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury * * *." (Revised Statutes §877, cited to this section, was derived from the Act of February 26, 1853, 10 Stat. 169).

The subpoena statutes relevant to the instant proceedings, i.e., Rule 17, F. R. Crim. P. (eff. 1948) and Rule 45, F. R. Civ. P. (eff. 1938), supercede 28 U. S. C. §655 and R.S. §877 and omit the above quoted language. However, the Notes of the Advisory Committee (see Rule 45, F. R. Civ. P.) do not indicate any Congressional intent to limit the efficacy of the subpoena, but rather to "simplify the form." Professor Moore apparently still regards the *Blackmer* case, decided prior to the Federal Rules as presently applicable law. 5 Moore, Federal Practice ¶45.03[2] n. 5 (1964 ed.). Cf. Kenyon v. Automatic Instr. Co., 10 F. R. D. 248, 252 (W. D. Mich. 1950).

[6] It is clear that the subpoena in the instant case (Exhibit 1) contains the language previously found in Section 655, ordering the witness attendance until he is granted "leave to depart." Even though petitioner was permitted to go to Switzerland, it cannot be seriously contended that he was "excused" with the result that the Court lost jurisdiction over him. Such an interpretation would be at odds with the express direction of the foreman commanding his reappearance.

We note, too, that the affidavits submitted by the Government attest to the long standing practice in this district

with respect to using one subpoena, as here, to compel the attendance of the witness at subsequent meetings of the Grand Jury. See also Government's Memorandum, pp. 13-14. Petitioner has advanced no compelling reason why this practice should now be abandoned.

[7] Petitioner was clearly aware that he had not been discharged. It is not contended that his failure to appear was other than wilful or knowing. The allegation that petitioner, by testifying, might violate Swiss law is speculative and unavailing as a defense to a contempt proceeding predicated on his failure to appear. Application of Chase Manhattan Bank, 297 F. 2d 611 (2d Cir. 1962), cited by petitioner does not require a contrary result.

In sum, the failure of petitioner to appear on May 31, 1966 flouts the lawful process of this Court and is contemptuous.

Accordingly, motion to vacate is denied.

No convincing presentation of fact appearing in support thereof, the application for a stay is denied in all respects at this time.

So ordered.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

OF

A Grand Jury Subpoena served on
WALTER GERMANN

ORDER AND JUDGMENT
M-11-188

The United States of America, having moved this Court by order to show cause dated July 13, 1966 for an order holding Walter Germann in contempt of this Court because of his failure to appear before a Grand Jury in and for the Southern District of New York on May 31, 1966, and

Said order to show cause and supporting papers having been personally served by hand on Ross, Wels & Marcus, counsel for Walter Germann, on July 13, 1966 and by registered mail sent to Walter Germann on July 14, 1966, and

The return date of said motion having been adjourned from August 1, 1966 to August 8, 1966 and August 8, 1966 to August 15, 1966 at the request of counsel for Walter Germann, and

Said motion having come on to be heard by this court on August 15, 1966, and Walter Germann having failed to personally appear in connection therewith,

Appendix F

Now, upon the order to show cause, the affidavits of Piere M. Leval, sworn to on July 13, 1966, the affidavit of John S. Allee, sworn to on August 15, 1966, and upon the failure of Walter Germann to personally appear on August 15, 1966, and after hearing oral testimony submitted by the United States of America, and due deliberation having been had, it is hereby

ORDERED AND ADJUDGED, that Walter Germann is in civil contempt of this Court, and it is further

ORDERED AND ADJUDGED, that if Walter Germann does not appear on or before August 22, 1966, at Room 1401 of this Courthouse during the Grand Jury's normal business hours (Monday through Friday, 10:00 A.M. to 12:45 P.M.) for the purpose of testifying before the Grand Jury, he shall pay a fine to the United States of America in the amount of $25,000.00, and that he shall pay a fine to the United States of America in the amount of $1,000.00 for each day after August 22, 1966, until such time as he appears in Room 1401 of this Courthouse during the Grand Jury's normal business hours for the purpose of testifying before the Grand Jury, and it is further hereby

ORDERED AND ADJUDGED, that Walter Germann is enjoined from directly or indirectly transferring any assets out of the jurisdiction of this Court pending further hearing.

Dated: New York, N. Y.
August 15, 1966
4:27 p.m.

IRVING BEN COOPER,
U.S.D.J.

APPENDIX G

GRAND JURY MINUTES OF PETITIONER'S APPEARANCES, APRIL 29, MAY 2, MAY 6, MAY 10, 1966, FIRST SUBMITTED AFTER ORAL ARGUMENT IN THE COURT OF APPEALS

November 30, 1966

THE HONORABLE J. EDWARD LUMBARD
Chief Judge
United States Court of Appeals
for the Second Circuit
United States Court House
Foley Square
New York, N. Y.

Re: *In the Matter of A Grand Jury Subpoena served on Walter Germann*
Docket No. 30848

Dear Judge Lumbard:

In accordance with your request during oral argument on the above mentioned appeal, I am forwarding herewith three copies of the portions of the Grand Jury minutes relating to the adjournments of Walter Germann's appearances before the Grand Jury on April 29 and May 2, 6 and 10, 1966.

These minutes reveal a slight inaccuracy on page 4 of the Government's brief as to the identity of the Grand Jury panel before which Germann appeared on the third of his four appearances pursuant to the adjournments of his subpoena. On April 29, the return date of the subpoena, Germann testified before the April additional Grand Jury. At the termination of this session, the foreman directed

Germann to reappear on Monday, May 2. On that date, Germann reappeared before the same Grand Jury, and again at the close of the session was directed to reappear on Friday, May 6. The May 6 appearance also took place before the April additional Grand Jury. This appearance was solely for the purpose of again adjourning the subpoena in response to Germann's lawyer's request that the questioning be expedited by conducting it in the United States Attorney's office. Germann was excused until May 10 (See A. 129).

Upon his return on May 10, Germann expressed his desire to make a statement for the record (See May 10 Grand Jury minutes). He was brought before the May regular Grand Jury which after his testimony, adjourned his appearance to May 31, directing him to reappear on that date.

The reason for the final appearance before the May regular rather than the April additional panel derives from Germann's unanticipated request to be allowed to make a clarifying statement for the record. In view of the prior agreement with Germann and his attorney to conduct the questioning informally in the United States Attorney's office rather than before the Grand Jury (A. 129-130, 110-111) the session of the April additional panel had been scheduled without allowing time for any lengthy taking of testimony from Germann. Thus upon his request to be allowed to testify in clarification for the record, he was taken before the recently empanelled May regular Grand Jury which also was inquiring into related matters and which had time available during that morning to hear testimony.

The minutes thus show first that Germann's subpoena at no time lapsed since each appearance was terminated by an adjournment to a date certain with a direction to re-

appear. The change to a second Grand Jury panel furthermore was for the purpose of accommodating his own request to be allowed some unscheduled time to testify.

Very truly yours,

ROBERT M. MORGENTHAU
United States Attorney
By: JOHN S. ALLEE
Assistant U. S. Attorney

Encls.

CC: Louis Bender, Esq.
225 Brodway
New York, N. Y.

[HEARING OF APRIL 29, 1966]

Apr. Spl.

Mr. Allee, Mr. Leval, Mr. Kaufman.

(1) WALTER GERMANN, called as a witness, and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

* * *

(4) Foreman: Yes. You are excused for a few minutes.

Witness: Thank you.

Foreman: Remain outside. You understand you have to wait?

Witness: I have to wait, yes.

(Witness leaves room and is recalled.)

Foreman: You are still under oath.

Appendix G

Q. Mr. Germann, I am afraid we have quite a bit more to go into and we'd like to have you back Monday. I hope that's not too inconvenient for you. We realize you have plans to leave. A. Well—

Q. If any of this information I have requested, could any of that be supplied by Monday, or do you think it would take longer than that? A. That is difficult. I just wanted to ask you: I don't know how much longer your proceedings will last, but it would be much easier if I could leave for a couple of days and come back, because then I could look up the documents and supply you with it.

Q. Well, I think we may have a lot more information that you will have to supply— A. Have to supply—

Q. —on Monday, and if you can come back on Monday, maybe we can discuss the information we want you to get. So I think Monday would be— A. Yes, sir.

Q. I have just one more question. Could you tell us where you came from before entering the United States this last time? (5) A. I left from Basel, my home, in the morning and went through Paris, where I bought a TWA— on a direct nonstop flight to New York.

Mr. Allee: Mr. Foreman, could you direct the witness to return here at ten o'clock on Monday morning.

Foreman: You are directed to return to this hearing on Monday morning.

Witness: Yes, sir.

(Witness leaves room.)

Appendix G

[HEARING OF MAY 2, 1966]

April Spec.

(1) WALTER GERMANN, recalled as a witness, having been previously duly sworn by the Foreman, testified as follows:

* * *

Q. I'm afraid, Mr. Germann, that we're going to have to have you back again. The Grand Jury's time now has run out; it's time for me to excuse them. Could we meet with you again on Friday of this week? A. Well,—you're in control of the situation. I could supply you much better with data, if I could take leave and bring everything back, but that's—you must decide that.

Q. You're free to do anything you want between now and Friday. A. Yes, but I mean I may get stuck, and I don't want to be stuck and to not be able to appear, because this is a short period of time—Tuesday, Wednesday, Thursday.

(2) Q. I take it some of these matters, though, you can ascertain without making a trip to Panama or without going back to Switzerland. A. Well, all the stock situations for Banco Suizo and Swiss Panamanian I'll have to get from Panama, and the best for me to do would be to go down there. Now, I might change my plans and go first south and come back. That's easier than to take the long trip back to Switzerland.

Q. Well, my feeling is that when Friday comes around, we're going to have a lot of questions we haven't covered yet, and there's going to be a lot more data, so you'd probably have to go back to Switzerland anyway to get that, so I suggest you come back Friday and, meantime, whatever you can get by any other means, you do so. A. Yes, sir.

Q. And we'll have some more matters to cover on Friday. A. Yes.

Appendix G

Mr. Allee: Mr. Foreman, may the witness be directed to appear here again Friday at ten o'clock.

Foreman: The witness is excused, but directed to return here at ten o'clock on Friday of this week—the 5th is that?

Mr. Allee: The 6th.

Foreman: Next Friday, the 6th?

Mr. Allee: Yes.

Foreman: Yes, May 6th.

Mr. Allee: You're excused until May 6th.

Witness: Thank you. Good morning.

(Witness excused.)

[Hearing of May 6, 1966]

April Spec.

(1) Walter Germann, recalled as a witness, having been previously duly sworn by the Foreman, testified as follows:

By Mr. Leval:

Q. Mr. Germann, you're already under oath. A. Yes, sir.

Q. Mr. Germann, I understand it's your request that your appearance before this Grand Jury be adjourned at this time until this coming Tuesday, is that correct? A. Well, the Tuesday is not my choice, but it was my lawyer's advice, Mr. Wels' advice, to ask for a more expeditious way of handling the interrogation because this is really considerably inconvenient to me. I had planned to go back home already a week ago, and I would like to make some plans, that's all.

Q. Have you made arrangements with your lawyer to speak this afternoon with representatives of this office concerning the matter? A. Yes, sir.

Appendix G

Mr. Leval: All right. May the Foreman please direct the witness to return before this Grand Jury on this coming Tuesday, which is the earliest available date; Tuesday—that's the 10th of May—at 10:00 A.M., and may the witness be excused now until such time.

Foreman: You're excused until the 10th of May.

Witness: Yes, sir. I'll return on Tuesday, the 10th. Thank you. Good day.

(Witness excused.)

[Hearing of May 10, 1966]

Reg.

(1) Walter Germann, having been duly sworn by the Foreman, testified as follows:

By Mr. Allee:

Q. Mr. Germann, you talked to me outside about a statement that you wanted to make for the record, concerning your testimony of last week. Would you please go ahead and make that statement?

* * *

(8) Mr. Allee: Mr. Foreman, could you instruct the witness to return here at 10 o'clock on the 31st of May.

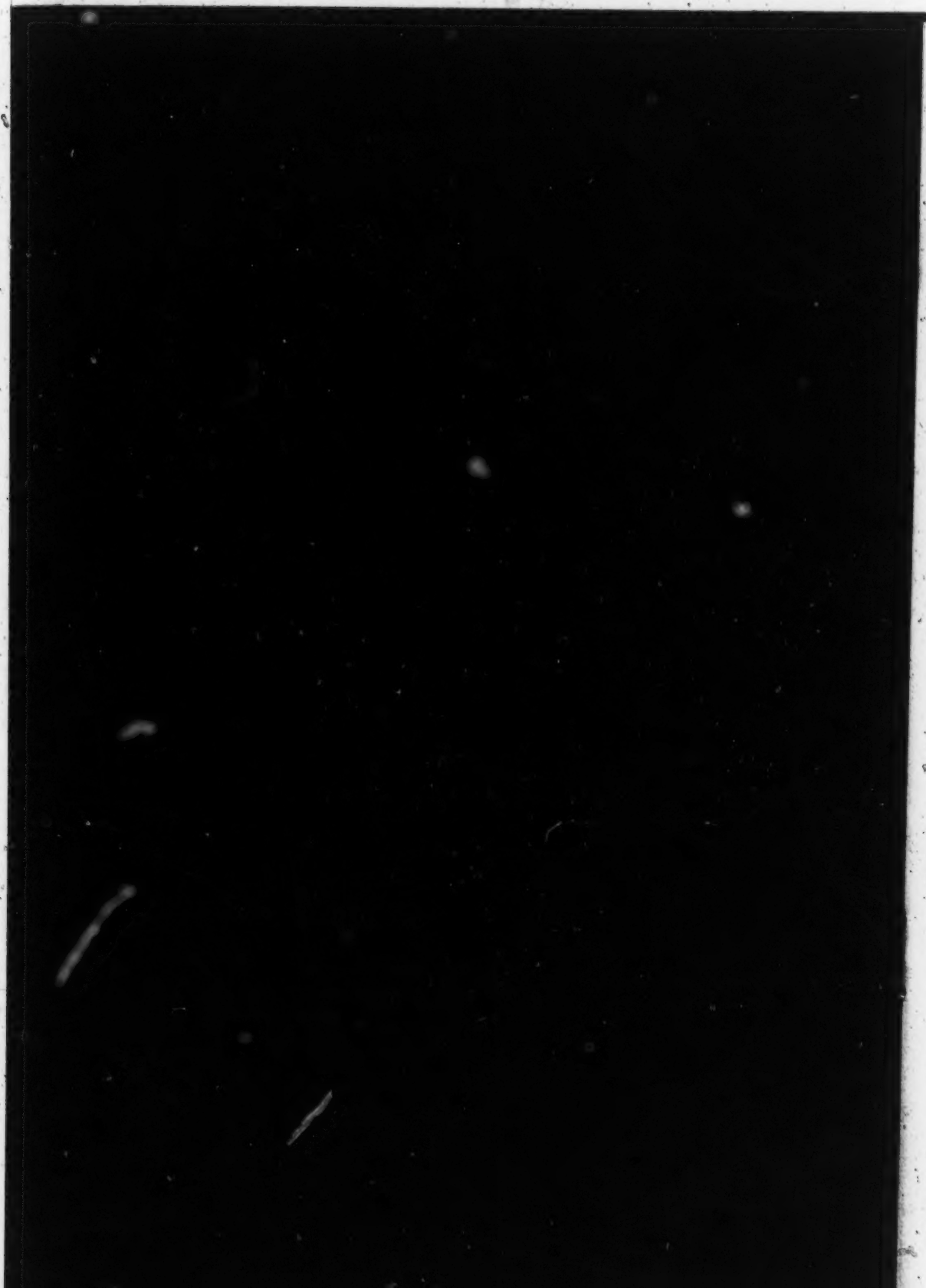
Foreman: Did you hear the instruction, sir? Would you return on that date and at that time?

Witness: Yes, sir. On the 31st of May at 10 o'clock in the morning?

Mr. Allee: That is right. And that the subpoena is adjourned until that time.

Witness: Thank you, sir.

(Witness leaves room.)



In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 384

WALTER GERMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This proceeding involves an adjudication of civil contempt against petitioner, Walter Germann, a resident and citizen of Switzerland. Mr. Germann died on April 10, 1967, prior to the filing of the petition.[1] After a hearing in the United States District Court for the Southern District of New York on August 15,

[1] A judgment for civil contempt does not abate by reason of the death of the defendant. *Wasserman* v. *United States*, 161 Fed. 722 (C.A. 8), reversed per sipulation, 166 Fed. 1022 (C.A. 8; *Howard* v. *Wilbur*, 166 F. 2d 884, 885 (C.A. 6); see *Pino* v. *United States*, 278 Fed. 479 (C.A. 7); 4 Barron & Holtzoff, *Federal Practice and Procedure* § 2428, p. 384 (Rules ed., 1951); cf. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-552; *Kirk* v. *Commissioner*, 179 F. 2d 619 (C.A. 1); *United States* v. *Templeton*, 199 F. Supp. 179 (E.D. Tenn.).

279-137—67

1966, petitioner was found in contempt for his failure to appear before a grand jury of that court on May 31, 1966, as had been directed by the grand jury foreman at the close of his appearance before that body on May 10, 1966. The district court's order provided that if petitioner failed to appear before the grand jury on or before August 22, 1966, he would be fined $25,000, plus $1000 for each day thereafter until he appeared (Pet. App. F). A motion to vacate this order, filed by petitioner's counsel, was denied with a memorandum opinion on September 27, 1966, 262 F. Supp. 707 (Pet. App. E), and the court of appeals affirmed, 370 F. 2d 1019 (Pet. App. A).

There is in any event no occasion for this Court to review the issues which have already been carefully considered and correctly resolved by the courts below.

In April and May, 1966, two federal grand juries in the Southern District of New York were conducting investigations into the activities in the United States of an international holding company controlled by petitioner, a citizen of Switzerland (App. 6, 65, 133).[1] While petitioner was in New York City on business, he was personally served with a subpoena to appear before a grand jury on April 29, 1966. (The subpoena provided that petitioner was "not to depart the Court without leave thereof, or of the United States Attorney" (App. 9).) He appeared as directed and at the end of the session he was told by the foreman to return

[1] "App." refers to the Appendix to Appellant's Brief in the court of appeals.

on May 2 (Pet. App. G 24a) and on that day similarly directed to appear again on May 6, 1966 (Pet. App. G 26a). In order to facilitate petitioner's business convenience, his counsel worked out an arrangement with the government whereby petitioner's testimony could be expedited by examination at the United States Attorney's office (App. 129–130). This accommodation is reflected in the minutes of the May 6, 1966, session of the April Special Grand Jury where it also appears that petitioner was directed by the foreman to return on May 10, 1966 (Pet. App. G 26a–27a). When petitioner appeared on May 10, he unexpectedly requested an opportunity to make a statement before the grand jury. Since the April grand jury, in view of petitioner's prior arrangements with the government, had not allotted time for a statement from petitioner, petitioner was permitted to make his statement to the May Regular Grand Jury, which was also inquiring into related matters (Pet. App. G 21a–23a). After petitioner gave his statement, he was directed by the foreman to return on May 31, 1966—a time worked out and agreed to by petitioner, his counsel, and the government, pursuant to petitioner's request that he be permitted to go to Switzerland to obtain documents and information pertinent to the investigation (Pet. App. G 27a; App. 7, 35, 65, 130).

Petitioner did not appear on May 31, 1966, as directed. Instead, on that day he cabled the attorney who had been counseling him in connection with his appearances to have him inform the government that

petitioner did not intend to return from Switzerland (Pet. App. E 12a; App. 7, 36, 115).

On July 13, 1966, the court issued an order to show cause why petitioner should not be held in civil and criminal contempt for his failure to appear on May 31, 1966. Copies of the order and supporting affidavits were duly served on petitioner's counsel in New York and by certified mail on petitioner at his address in Switzerland. Petitioner's attorney also cabled him the entire text of the moving papers (App. 4, 10, 28–29, 131).

Petitioner discharged the attorney who had been representing him. Subsequently, after requesting and obtaining a continuance from August 1 to August 15, petitioner's new counsel withdrew from the case (App. 10–12, 66–67). On August 15, a further continuance was requested by still new counsel, and was granted as to the criminal aspect but denied as to the civil contempt. The request was made so that counsel could have further time to decide whether to undertake the representation of petitioner (App. 14). After a further adjournment was refused, counsel was invited to participate but declined (App. 27, 28). The court then proceeded with the hearing. Petitioner was found in civil contempt and ordered to appear by August 22, 1966, with a fine fixed for non-appearance.

1. Petitioner argues (Pet. 15–23) that the oral direction of the grand jury foreman to return on a certain date was not a valid "process", disobedience of which constitutes contempt under 18 U.S.C. 401. As the court below held (Pet. App. A 4a–5a), this contention is without merit. The original subpoena, ad-

mittedly valid, directed petitioner not to depart the jurisdiction of the court except by leave or with the permission of the United States Attorney. The long established practice of permitting the foreman of a grand jury to order a physically present witness to return on a date certain is a sensible and flexible method for continuing the availability of a witness. The grand jury is an arm of the court.[3] Because of this, the court of appeals correctly observed that "it would be an absurd interpretation of the rules and the power of a district court to hold that a grand jury acting through its foreman could not direct the further attendance of the witness when the witness is present before it" (Pet. App. A 5a). The validity of this conclusion is in no way undermined by the fact that petitioner was appearing before a panel other than the one he had first testified before. Moreover, petitioner and his counsel affirmatively agreed without objection to return on the date set. Petitioner was not entitled thereafter to ignore the order of the grand jury colorably valid on its face (see Pet. App. G 27a), on the ground that the adjournment was beyond the *de jure* power of that body. See *McPhaul* v. *United States*, 364 U.S. 372, 379; *United States* v. *Bryan*, 339 U.S. 323, 333; *United States* v. *United Mine Workers*, 330 U.S. 258, 290–301; *Howat* v. *Kansas*, 258 U.S. 181, 189–190.

2. Petitioner argues that since he was not personally served with the order to show cause the dis-

[3] *Levine* v. *United States*, 362 U.S. 610; *Brown* v. *United States*, 359 U.S. 41, 49; *In re Black*, 47 F. 2d 542, 544 (C.A. 2); *United States* v. *Smyth*, 104 F. Supp. 283, 291 (N.D. Calif.); *Application of United Electrical Radio & Machine Workers*, 111 F. Supp. 858, 864 (S.D.N.Y.).

trict court had no jurisdiction to find him in civil contempt (Pet. 23–29, 42–47). Petitioner was, however, personally served with the subpoena within the jurisdiction of the court and actually appeared several times before the grand jury.[4] The motion for a coercive contempt order to compel appearance was not a new proceeding; it was, rather, "ancillary to the grand jury hearing and designed as an aid to it." See *Harris* v. *United States*, 382 U.S. 162, 165. *In personam* jurisdiction was acquired with the service of the subpoena in New York. Any additional due process requirements were satisfied when actual notice was given of the ancillary civil contempt proceeding. See, *e.g.*, *Leman* v. *Krentler-Arnold Co.*, 284 U.S. 448, 452; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302 (C.A. 2); *Brooks* v. *United States*, 119 F. 2d 636, 644 (C.A. 9); *Tilghman* v. *Tilghman*, 57 F. Supp. 417, 418 (D.D.C.). One personally served with a subpoena cannot defeat its enforcement by thereafter crossing state or international boundaries.

3. The contempt conviction is not subject to vacation on the claim that the district court, which did not have the grand jury minutes before it, based its order on erroneous findings (see Pet. 32–42).

The district court did inaccurately state that the foreman of the April Additional Grand Jury directed petitioner to appear before the May Grand Jury on May 2, and that petitioner appeared before the May

[4] For this reason the procedures outlined in 28 U.S.C. 1783 and 1784 for service of subpoenas in a foreign country and for supporting contempt proceedings (Pet. 5–7, 42–47) are inapplicable.

Grand Jury thereafter. Actually, petitioner appeared before the April Special Grand Jury on April 29 and May 2 and 6. He was orally instructed each time as to his next appearance. On May 6 he was told to return on May 10. On May 10, petitioner was taken before the May Regular Grand Jury as an accommodation to petitioner to permit him to make a statement for the record. At the termination of that testimony, petitioner was instructed by the foreman of the May Grand Jury to return on May 31. This error in background in no way affected the basic rationale of the district court's opinion. Nor did the court of appeals affirm the order on evidence not before the district court. The original subpoena did not limit petitioner's appearance to a particular panel of the grand jury. Both courts below agreed that the essential basis for finding contempt was the conclusion that the May 10 order to return on May 31 was a lawful "process" of the court. Both courts concluded that it was immaterial that the appearances involved two different grand jury panels (Pet. App. A 6a; Pet. App. E 16a). While the district court seemed to regard the subpoena as the basis for the authority of the foreman to issue oral orders, and the court of appeals noted that the power to issue such orders could also be acquired through the witness's actual appearance before the grand jury, this was not a change in the basis of decision. The significant fact, as both courts recognized, was that the order of May 10 was a lawful process which petitioner was under a duty to obey.

4. Petitioner's own Statement of Facts (Pet. 9–10), taken in context, wholly refutes his contention that

his right to counsel was denied (Pet. 30–32). After the show cause order was served, he dismissed the attorney who had thus far been advising him in connection with his grand jury appearances, and retained another lawfirm. When that firm withdrew from the case, it notified petitioner that the hearing was set for a date ten days hence (Pet. App. E 13a). Despite this interval, on the day set for the hearing a third attorney appeared at the contempt hearing to seek a further continuance in order to decide *whether* to represent petitioner. It is important to recognize that the objective of the civil contempt proceeding was to compel petitioner to continue his testimony before an investigative grand jury. The district court plainly did not abuse its discretion in proceeding with the civil contempt proceeding after the already substantial delays.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 384

WALTER GERMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR REMAND AND VACATION OF JUDGMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 384

WALTER GERMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR REMAND AND VACATION OF JUDGMENT

It is hereby moved by counsel for petitioner, Louis Bender, Esq., pursuant to Rule 48 of the Rules of this Court, that as the action and judgment should abate and as the cause is now moot, the case should be remanded to the United States District Court for the Southern District of New York with instructions to vacate its order and judgment of August 15, 1966 (App. 45a)* and dismiss the proceeding. In support thereof, counsel shows unto the Court the following:

* Citations in the form "App. — a" refer to the record on appeal, a copy of which has been previously filed with this Court.

1. The present case is before this Court on petition for *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit entered January 12, 1967, affirming an order and Judgment of the United States District Court for the Southern District of New York entered August 15, 1966, which held in contempt the original petitioner, Walter Germann, and imposed a fine of $25,000.00 and a further cumulative fine of $1,000.00 a day to compel Mr. Germann to appear before a grand jury in the Southern District of New York. Although referred to below as a "civil contempt," the judgment contained no purge clause.

2. On or about the 14th day of September, 1967, a motion was filed by counsel to substitute the Konkursamt Basel-Stadt (Basel Bankruptcy Court) as party petitioner owing to the death of the original petitioner, Walter Germann. Mr. Germann was a Swiss national and resident at all times and the Konkursamt Basel-Stadt is the representative of his estate.

3. As the contempt proceedings below were initiated and prosecuted to compel Walter Germann to appear and testify before a grand jury in the Southern District of New York, the death of Mr. Germann has rendered the relief sought and obtained in the courts below moot.

4. The judgment below should also abate because it imposed a fine, the sole purpose of which was to punish and penalize the late Mr. Germann for his failure to reappear pursuant to the oral direction of the foreman of the May 1966 regular grand jury (App. 34a-35a, 45a).

5. The purpose of the contempt proceeding below was to compel the late Mr. Germann to travel from his home in Switzerland to New York City and there appear before a grand jury in the United States Court House for the South-

ern District of New York (App. 21a, 41a). The order and judgment of contempt entered below was designed to accomplish that purpose (App. 45a). As the relief sought in the proceeding now before this Court for review may no longer be afforded as a result of the decease of Mr. Germann, the cause should be remanded with instructions to vacate and dismiss the judgment on motion as this Court has held on many occasions. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 71 S. Ct. 104 (1950); *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267-68, 57 S. Ct. 202, 205 (1936); *Brownlow* v. *Schwartz*, 261 U. S. 216, 43 S. Ct. 263 (1923); *Mills* v. *Green*, 159 U. S. 651, 654-57, 16 S. Ct. 132, 133-34 (1895); *Little* v. *Bowers*, 134 U. S. 547, 10 S. Ct. 620 (1890); *Singer Manufacturing Co.* v. *Wright*, 141 U. S. 696, 12 S. Ct. 103 (1891); *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360, 39 S. Ct. 512 (1919); *Heitmuller* v. *Stokes*, 256 U. S. 359, 41 S. Ct. 522 (1921); *Alejandrino* v. *Quezon*, 271 U. S. 528, 46 S. Ct. 600 (1926); *United States* v. *United States Tariff Commission*, 274 U. S. 106, 112, 47 S. Ct. 499, 502 (1927); *Atherton Mills* v. *Johnson*, 259 U. S. 13, 42 S. Ct. 422 (1922); *United States* v. *Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U. S. 466, 478, 36 S. Ct. 212, 217 (1916); *Berry* v. *Davis*, 242 U. S. 468, 37 S. Ct. 208 (1917); *Codlin* v. *Kohlhausen*, 181 U. S. 151, 21 S. Ct. 584 (1901); *Brotherhood of Locomotive Firemen and Enginemen* v. *Toledo, Peoria & Western Railroad*, 332 U. S. 748, 68 S. Ct. 53 (1947); *Farmers Grain Co.* v. *Brotherhood of Locomotive Firemen and Enginemen*, 332 U. S. 748, 68 S. Ct. 53 (1947); *Taylor* v. *McElroy*, 360 U. S. 709, 711, 79 S. Ct. 1428, 1429 (1959); *Richardson* v. *McChesney*, 218 U. S. 487, 31 S. Ct. 43 (1910); *Hodge* v. *Tulsa County Election Board*, 335 U. S. 889, 69 S. Ct. 250 (1948).

6. The huge fine imposed upon the deceased Mr. Germann was a penalty for his failure to appear before the grand jury pursuant to the foreman's request. The pro-

ceeding was prosecuted by the United States Attorney's office in the name of the United States. There was no allegation of, attempt to prove, or compensation in the judgment for any damages incurred by the plaintiff. The only standard applied by the District Court to determine the magnitude of the fine it imposed was the supposed assets of Mr. Germann at the time of the judgment (see App. 37a-40a, 41a). This Court construed the nature of such a fine in *United States* v. *United Mine Workers*, 330 U. S. 258, 303-04, 67 S. Ct. 677, 701 (1947):

> "Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.
>
> "But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.
>
> "It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." 330 U. S. 304, 67 S. Ct. 701.

7. Where the judgment imposes a fine which is a penalty, as in the present case, as distinguished from a monetary award intended to compensate the complainant for damages

suffered, the penalty should abate upon the death of the defendant. *McGovern* v. *United States,* 280 Fed. 73 (7th Cir. 1922); *United States* v. *Pomeroy,* 152 Fed. 279 (C.C. S.D.N.Y. 1907), rev'd. on other grounds, 164 Fed. 324 (2d Cir. 1908), cited with approval by this Court in *United States* v. *Johnson,* 319 U.S. 503, 520 n.1, 63 S.Ct. 1233, 1241 n.1 (1942) and *Singer* v. *United States,* 323 U.S. 338, 346, 65 S. Ct. 282, 286 (1945); *United States* v. *Dunne,* 173 Fed. 254 (9th Cir. 1909). The provisions of 18 U.S.C. §3565 that a fine or penalty portion of a judgment "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases" does not apply after the death of the defendant. *United States* v. *Pomeroy, supra; Crooker* v. *United States,* 325 F. 2d 318, 321 (8th Cir. 1963) and cases cited. The rationale for thus dealing with a judgment imposing fines and penalties was well stated by the *Pomeroy* decision, "if the money had been collected before his death, [the defendant] would have been punished. If it is collected now his family will be punished, and he will not be punished." 152 Fed. at 282. This principle has its source in our Constitution, U.S. Const., Art. III, §3, and our statutes, 18 U.S.C. §3563.

8. The statement in note 1, page 1, of respondent's memorandum in opposition to the petition for certiorari in this Court apparently was intended to avoid the result of the cases just cited. The contention is made that "a judgment for civil contempt does not abate by reason of the death of the defendant". The abatement of a judgment in a contempt case is not determined solely by applying the rubric of "civil" or "criminal". The line between the two types of contempt is a fine one. Cf. *Pino* v. *United States,* 278 Fed. 479 (7th Cir. 1921). The determinative factor on the question of abatement should be whether the contempt judgment imposes a penalty or is designed to compensate the plaintiff for damages suffered. The cases cited by respond-

ent such as *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-52, 63 S.Ct. 379, 388 (1943); *Kirk* v. *Commissioner*, 179 F. 2d 619 (1st Cir. 1950); *United States* v. *Templeton*, 199 F. Supp. 179 (E.D. Tenn. 1961); are wholly inapplicable to the instant situation.* They deal with situations where the courts have determined that under specific statutes Congress has determined that double, treble or some other multiplication of damages pursuant to a legislative formulation is appropriate to compensate the Government for the harm at which the particular statute is directed. The contempt statute, 18 U.S.C. §401, is not such a statute but is a specification by Congress of the areas in which the contempt powers of the Federal courts may be exercised. The imposition of damages or penalty in an appropriate case is determined solely by judicially determined standards applied to the circumstances of the particular case. The court below which imposed the contempt judgment at no time considered a compensatory fine nor did it impose one. The fine it did impose was intended as a penalty to punish the late Mr. Germann for his failure to return before the May 1966 regular grand jury in response to the foreman's request.

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* Respondent cites three other cases in note 1 of the memorandum in opposition. (1) *Wasserman* v. *United States*, 161 Fed. 722 (8th Cir. 1908), which dealt with a contempt judgment imposed in a civil action for disobedience of an injunction in that suit. The holding in *Wasserman* that the fine would not abate on the death of the defendant, 261 Fed. at 724, is no longer the rule in the Eighth Circuit. *Crooker* v. *United States*, 325 F. 2d 318, 321 (8th Cir. 1963). (2) *Pino* v. *United States*, 278 Fed. 479, 482 (7th Cir. 1921) held that a contempt fine imposed for violation of an injunction against violating the National Prohibition Act was penal in nature, did not impose damages for the wrong committed, and abated on the death of the contemnor. (3) *Howard* v. *Wilbur*, 166 F. 2d 884, 886 (6th Cir. 1948), held moot a proceeding to disbar an attorney, who had died after the entry of the order of disbarment, reversed the judgment below and remanded the case with direction to dismiss the complaint.

9. The argument made in the memorandum in opposition does not deal with the fact that the proceeding below which was intended to force the deceased to appear and testify before a grand jury in the Southern District of New York is now moot. The proceedings can no longer achieve their purpose, the appearance of the deceased before the grand jury. The fine imposed can no longer achieve the end of punishing the deceased for his non-appearance nor of compelling that appearance.

WHEREFORE, it is respectfully prayed that an order be entered remanding the case to the United States District Court for the Southern District of New York with instructions that the judgment herein be vacated and the proceedings dismissed.

Respectfully submitted,

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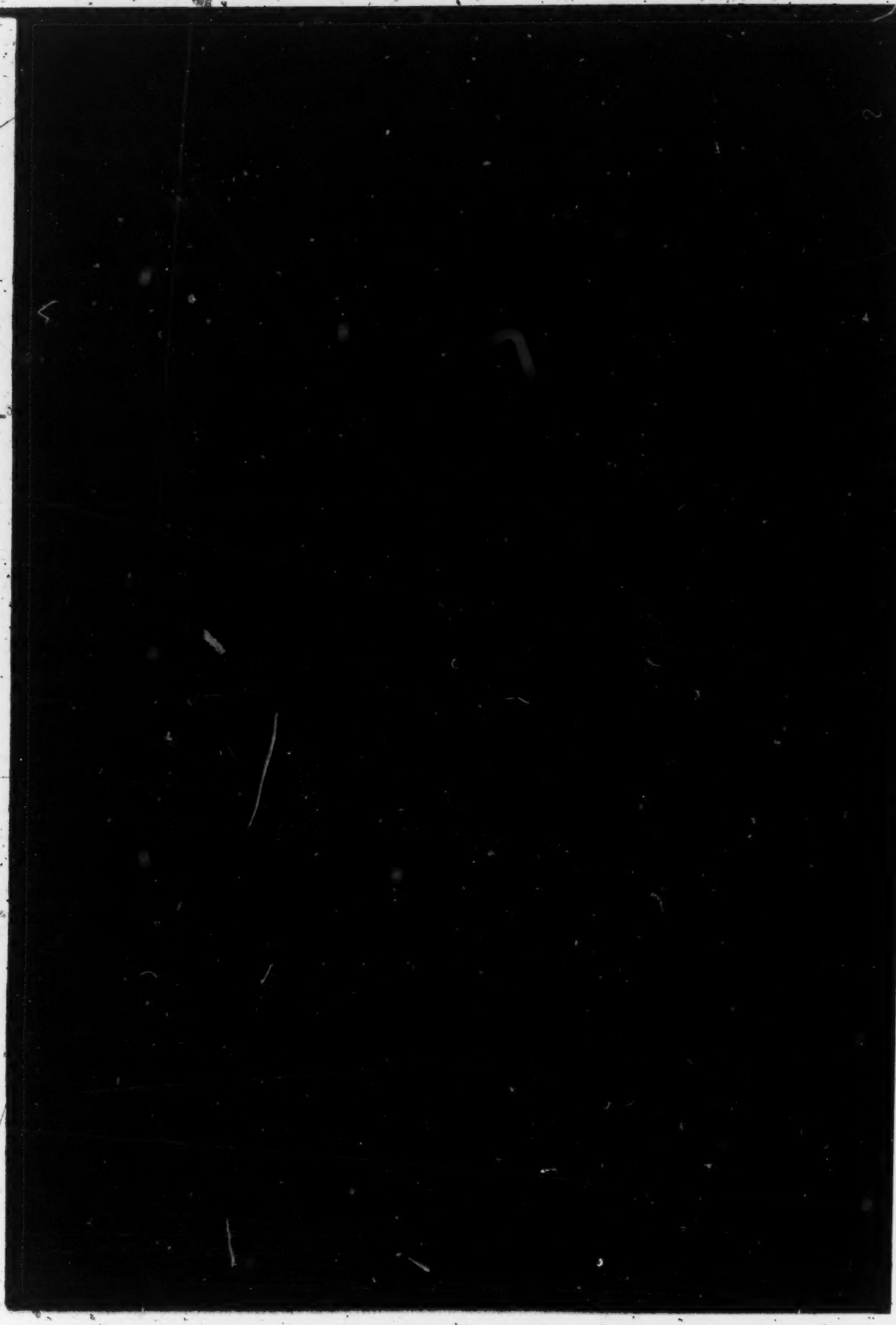

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 384

WALTER GERMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE MOTION FOR REMAND AND VACATION OF JUDGMENT

As set forth in our memorandum in opposition to the granting of the petition for a writ of certiorari in the instant case, petitioner Walter Germann was adjudged in civil contempt in the United States District Court for the Southern District of New York on August 15, 1966, for refusing to return for the purpose of continuing his testimony before a grand jury of that court. He did not receive a retrospective fine for

his past failure to appear; rather, in what was plainly a civil proceeding, he was ordered on August 15, 1966, to appear before the grand jury on or before August 22, or incur a fine of $25,000, plus $1,000 for each day thereafter until he appeared. As the motion to remand itself recognizes (Mot. 2-3), the sole purpose of the order and judgment of civil contempt was to compel petitioner to appear before the grand jury at a later date. Petitioner never complied. By the time of his death on April 10, 1967, a substantial fine had accrued.

The present claim that the judgment is moot is based on the erroneous premise that the fine was imposed as a penalty to punish petitioner for his failure to appear before the grand jury pursuant to the foreman's request (Mot. 3-5). This is not the case. The judgment was not a fine directed at past conduct. The order and judgment of August 15, 1966, had but one purpose: to afford the United States remedial relief by inducing petitioner to appear before the grand jury on or before August 22, 1966, or at as early a date thereafter as the power of the court might achieve.

The instant motion incorrectly assumes that since the contempt adjudication was not compensatory in nature, it must have been a form of penal contempt, with the sanction abating upon the death of the contemnor. This case, however, involves a form of civil contempt adjudication. The use of the civil contempt power to attempt to coerce obedience to court orders is well recognized. See *Shillitani* v. *United States*,

384 U.S. 364; *United States* v. *United Mine Workers of America*, 330 U.S. 258, 303-304; *Penfield Co.* v. *S.E.C.*, 330 U.S. 585, 590. The fact that the conditional fine actually matured upon petitioner's failure to comply with the order does not convert a remedial and coercive sanction into a penal exaction. See *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418, 443; *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Company*, 380 F. 2d 570, 578-579 (C.A.D.C.).

This case aptly illustrates the differences between civil and criminal contempt. The contempt order was specifically designed not to punish, but to apply increasing pressure so that delay would be avoided. Since a grand jury has a limited existence, prompt compliance with its orders to appear is vital; it was solely this objective that the contempt order sought to vindicate. Since the proceedings were instituted for prospective and remedial purposes, they were civil in nature and effect. The authorities previously cited in the government's memorandum in opposition (page 1, note 1) support the view that a fine for civil contempt does not abate upon the death of the contemnor. All of the cases cited by petitioner (Mot. 5) involve criminal fines imposed after criminal convictions and accordingly fall within the settled rule that criminal actions, including collection of criminal fines not already paid, abate upon the death of the defendant.*

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* Petitioner mistakenly suggests (Mot. 6, footnote) that *Crooker* v. *United States*, 325 F. 2d 318, 321 (C.A. 8) overruled the prior Eighth Circuit ruling that a fine in civil

The remedial sanction of a conditional fine designed to enforce future compliance with a civil contempt order of the court to appear before a grand jury is analogous to a bail bond to ensure appearance of a defendant or witness. Once the condition of the bail bond is broken by the failure of the principal to appear, the surety (or the defendant if at large on his own recognizance under a money bond) becomes the absolute debtor of the United States in the amount of the bond. See, *e.g.*, *United States* v. *Mack*, 295 U.S. 480, 486-489; *Tennessee Bonding Co.* v. *United States*, 125 F. 2d 138 (C.A. 6). The fact that the defendant thereafter dies and the criminal proceeding is therefore dismissed does not abate the liability thus accrued. See *Detroit Fidelity & Surety Co.* v. *United States*, 59 F. 2d 565, 568 (C.A. 8), certiorari denied, 287 U.S. 633; cf. *United States* v. *The Stuyvesant Insurance Co.*, 379 F. 2d 277 (C.A. 2), certiorari denied, No. 418, O.T. 1967, October 16, 1967. Similarly, in the instant case, petitioner's civil liability for the amounts accrued prior to his death through his wilful failure to met the conditions of the order of the district court has not abated.

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contempt does not abate upon the death of the contemnor (*Wasserman* v. *United States*, 161 Fed. 722). *Crooker*, like other cases cited by petitioner, involved a criminal fine imposed upon conviction of a crime.

For the foregoing reasons, it is respectfully submitted that the motion to remand with directions to vacate the judgment should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

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SUPREME COURT OF THE UNITED STATES

October Term, 1967.

GERMANN *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 384. Decided December 11, 1967.

PER CURIAM.

The petition for certiorari is granted.

The judgment of the United States Court of Appeals for the Second Circuit is vacated, and the case is remanded to the United States District Court for the Southern District of New York in order to give that court an opportunity to consider the motion to substitute the Konkursamt Basel-Stadt (the Bankruptcy Office of Basel, Switzerland) as party petitioner, and to reconsider that court's former adjudication of contempt and the accompanying fine in light of the original petitioner's death.

It is so ordered.